THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 795

A BILL TO AMEND THE SHERMAN ACT AND THE CLAYTON ACT TO EXCLUDE FROM THE APPLICATION OF SUCH ACTS CERTAIN CONDUCT INVOLVING EXPORTS

JUNE 17, 1981

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THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT

WEDNESDAY, JUNE 17, 1981

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 10:10 a.m., in room 2228, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Mathias and Grassley.

Staff present: Peter Chumbris, antitrust counsel; Steve Cannon, antitrust counsel; and Ralph Oman, counsel to Senator Mathias.

PREPARED STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

Today we will hear testimony on S. 795, the Foreign Trade Antitrust Improvements Act. This bill would amend the Sherman and Clayton Acts to clarify the international application of U.S. antitrust laws.

Specifically, the bill provides that the Sherman Act would prohibit only conduct which has a direct and substantial effect on commerce within the United States or on a domestic firm competing for foreign trade.

The bill also would protect joint ventures that are limited to export trading from challenges under section 7 of the Clayton Act.

The purpose of this legislation is to aid the efforts of American business to compete vigorously and effectively throughout the world. The bill is designed to relieve the antitrust concerns of American businessmen over their conduct which primarily affects foreign, rather than domestic markets, and thus allows them to compete on more nearly equal terms with other great industrial and commercial powers.

S. 795, therefore, insures the proper focus and direction for our antitrust laws. Since the purpose of these laws is to protect our domestic markets and our consumers against anticompetitive conduct, there is no good reason to have our antitrust laws applicable to export transactions where direct and substantial domestic anticompetitive effects are nonexistent.

It should be noted that this bill does not and should not try to relieve American business from compliance with the antitrust laws of other countries where U.S. companies do business.

At the present time, the Federal courts consider a variety of factors in deciding whether to assert Sherman Act jurisdiction over conduct occurring in the course of commerce in the United States,

the relative interests of the United States vis-a-vis those of the country where the conduct or the effects occur, the nationality or allegiance of the parties, and the extent to which there is an explicit purpose to harm or affect American commerce.

This bill would not remove these factors from consideration in deciding whether to apply our antitrust laws to any particular conduct. It would, however, provide that before these or any other factors may be considered there must be a threshold determination that the conduct has had the requisite direct and substantial effect on commerce in this country. Without this determination at the outset, no Federal court should entertain a Sherman Act suit.

Section 3 of the bill serves to remove joint ventures formed to conduct export trade from the reach of the Clayton Act. Rather, such joint ventures would, like other concerted activity in foreign trade, be analyzed solely under the Sherman Act by looking to their actual effects.

Therefore, section 7 of the Clayton Act, which is designed to eliminate in their incipiency combinations which "may" tend to lessen competition at some future date, could not be used to challenge joint ventures.

By analyzing export trading joint ventures in terms of their actual direct and substantial effect on U.S. commerce, such agreements will not be frustrated on the basis of a speculative fear that they may later adversely affect domestic commerce.

Without objection, S. 795 will be inserted in the record at this point.

[Material follows:]

97TH CONGRESS
1ST SESSION

S. 795

To amend the Sherman Act and the Clayton Act to exclude from the application of such Acts certain conduct involving exports.

IN THE SENATE OF THE UNITED STATES

MARCH 25 (legislative day, FEBRUARY 16), 1981

Mr. THURMOND (for himself and Mr. DECONCINI) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend the Sherman Act and the Clayton Act to exclude from the application of such Acts certain conduct involving exports.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Foreign Trade Antitrust Improvements Act of 1981".

SEC. 2. The Sherman Act (15 U.S.C. 1 et seq.) is amended by inserting after section 6 the following new section:

"SEC. 7. This Act shall not apply to conduct involving trade or commerce with any foreign nation unless such conduct has a direct and substantial effect on trade and commerce within the United States or has the effect of excluding a domestic person from trade or commerce with such foreign nation.".

SEC. 3. Section 7 of the Clayton Act (15 U.S.C. 18) is amended by adding at the end thereof the following: "This section shall not apply to joint ventures limited solely to export trading, in goods or services, from the United States to a foreign nation.".

○

The CHAIRMAN. Today, we are indeed fortunate to have with us two able and distinguished members of the Reagan administration: The Honorable William F. Baxter, Assistant Attorney General in charge of the Antitrust Division; and the Honorable Sherman Unger, who serves as general counsel to the Commerce Department.

Gentlemen, on behalf of the committee, I welcome you here. At this time, we would be pleased to hear from you—whoever prefers to go first.

STATEMENT OF HON. WILLIAM F. BAXTER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. BAXTER. Thank you very much, Mr. Chairman. It is my great pleasure to be here today and talk with the committee about the Foreign Trade Antitrust Improvements Act.

The apparent purpose of this legislation, as you have already suggested, is to reduce uncertainty about the application of the antitrust laws to export activities. Before addressing myself to the merits of the bill, I would like to say a few words about that uncertainty.

The Antitrust Division has heard over the years of these concerns, and we have engaged in a variety of activities intended to reduce them. Certainly, it has never been our view that the rather attenuated connections with domestic interstate commerce that would suffice to bring the antitrust laws to bear on local activities within the United States would suffice in conjunction with export trade. And we have no disagreement whatsoever with the appropriateness of the standard—a direct and substantial effect—that is embodied in this legislation.

Notwithstanding our efforts, we understand that at least in some quarters this uncertainty has continued. Indeed, one can find a few lower court cases which can be read to justify that concern, and we have no feeling that legislation to dispel such uncertainty as remains is inappropriate. Accordingly, we have no significant controversy with S. 795, at least with its general thrust. We do, however, have several questions about particular language in the bill.

The amendment to the Sherman Act itself seems perfectly appropriate. The language that more or less parallels the language that appears in the Webb-Pomerene Act, which talks about the exclusion of a domestic competitor, I think, is likely to pose interpretive problems, if it is to be enacted in just that form.

The Webb-Pomerene Act talks about activity which is in restraint of the export trade of any domestic competitor, and the shift from that language in Webb-Pomerene to the term "exclusion" in the present context, at least, leaves open the possibility that the act might be interpreted to require a total exclusion of a competitor, and that does not seem to us appropriate. It would be our preference that language more closely paralleling that that now appears in Webb-Pomerene be incorporated in the bill.

With respect to section 3 of S. 795, I have no difficulty understanding why the committee thinks that some such amendment with respect to section 7 of the Clayton Act is appropriate. Certainly, there have been some very extreme applications of section 7 of

the Clayton Act over the years, and I would certainly agree that those extreme applications were inappropriate in the foreign commerce area. I also think, however, that they are inappropriate in the domestic area.

It is my view that with the passage of time the interpretations of section 7 of the Clayton Act and section 1 of the Sherman Act have really been brought into congruence in the courts. In short, I guess it is not my view that at the present time, correctly interpreted, section 7 reaches any activity that would not be reached under section 1.

When section 7 was first passed, there is absolutely no doubt that Congress intended it as an instruction to the courts to beef up their interference with merger activity. The courts, I think, got that message and followed that instruction, both in the context of section 7 and in the context of section 1. So, as I said, I do not think that, at the present time, there is any significant difference between the interpretation that is to be given those two statutes.

Therefore, what troubles me about the language in this bill dealing with section 7 is that it seems to reflect a view on the part of the committee that there is, and perhaps that there should continue to be, a difference between the intrepretation of those two sections, and that I find quite troublesome.

I do not understand why we should have two separate bodies of merger law bearing on exactly the same set of corporate activities. Particularly since the word "corporation" has been taken out of section 7, and section 7 now applies to the activities of "persons," it really is a legal impossibility for section 7 to exist meaning one thing and section 1 to exist meaning another and for both to have any operational consequences. The one that contains the most severe standard must always prevail with respect to all mergers.

So I certainly would be happier if section 3 of the bill were removed. On the other hand, I would have no objection whatsoever if the reference to section 7 were incorporated in the same paragraph as section 1 so that the legislation said that neither sections 1 nor 7 applied unless there was a direct and substantial effect on U.S. commerce. That would seem to me to be quite appropriate.

Finally, Mr. Chairman, I would like to say that although, with the linguistic exceptions to which I have just referred, the Department of Justice has no particular objection to legislation along the lines of S. 795, I want to note that the Department of Justice supports, as the administration supports, the concept of a bill that has already been passed by the Senate; namely, S. 734.

Together with the Department of Commerce, the Department of Justice has proposed an amendment to that bill, and the administration supports that bill together with the amendment which we have jointly worked out.

We do have a preference for S. 734 in comparison with S. 795 because it has one very important feature which does not appear in S. 795; namely, it does provide for a process of certification which affords greater certainty than can possibly result from the time-to-time interpretive application that may be given to the language of S. 795, however carefully drafted it may be.

In conclusion, Mr. Chairman, I would say that I want to reaffirm the support of the Department of Justice for S. 734, as amended, or

as it would be amended by the language we have proposed, and say at the same time that we have no objection to the passage of legislation along the lines of S. 795.

Thank you, sir.

The CHAIRMAN. Thank you, Mr. Baxter.

Mr. Unger, we would be pleased to hear from you.

STATEMENT OF HON. SHERMAN E. UNGER, GENERAL COUNSEL, U.S. DEPARTMENT OF COMMERCE, WASHINGTON, D.C.

Mr. UNGER. Thank you, Mr. Chairman. I am pleased to be here this morning to present the views of the Department of Commerce. I might at the outset say that we are in substantial agreement with Mr. Baxter's comments. We adopt them.

If I may, I would like to observe that exports do play a vital role in the U.S. economy. They preserve and they create jobs in our country.

At present 87 percent of the goods we export are the products of 1 percent of the American firms. Our largest U.S. corporations are now the ones that are engaged in export activities. If we are to offset our U.S. trade deficits by export expansion, we must develop new ways for the small- and the medium-sized American firms to export their products.

The authors of S. 795 recognize that we need to modify the impact of our Federal antitrust laws on export activity in order to stimulate our exports. However, the Department of Commerce feels that S. 795 still leaves the exporter with considerable uncertainty.

For example, enactment of S. 795 would not help a particular small business to know whether its export activity actually has a direct and substantial effect on commerce within the United States.

Currently, the business community has the perception—be it right or wrong—that under the existing law collective export activity may give rise to liability under the antitrust laws. Although there may be some dispute as to whether this perception is, in fact, correct, this perception, even if erroneous, inhibits the collective export activities of this country. The problem is compounded by the ever-present threat of private antitrust suits.

Those persons who believe themselves injured by collective export activities are not bound by the views of the Department of Justice. They may, and they do, seek redress in the courts, thereby exposing exporters to legal and related defense costs.

There is, however, a different bill than S. 795 which provides would-be exporters with the desired degree of certainty. It would make a vehicle available for those exporters by disclosing their contemplated activities in advance, in which they could obtain a ruling as to the propriety of their conduct under our antitrust laws.

This ruling would be binding both on the Federal Government and on potential private claimants. In doing so, it does not rely upon political tides or nonbinding administrative opinions. I am referring to title II of S. 734, the Export Trade Association Act which unanimously passed the Senate this past April.

The certification procedure contained in S. 734 addresses these concerns in a manner which provides the required certainty while,

at the same time, it reaffirms the integrity of the antitrust laws for the activities affecting U.S. commerce.

Certification, which provides a listing of those activities deemed within the scope of the antitrust exemption, offers a far more satisfactory solution to the problem of antitrust clarification and offers maximum protection from treble damage suits.

The Department of Justice and the Federal Trade Commission have an important consultive role in the certification process, and they do retain full authority to investigate and seek to amend or invalidate the certificate.

Moreover, that legislation and the certification procedure assure that the goals of the legislation—export promotion—are met as a condition for certification eligibility. This requirement is not present in S. 795.

The Department of Commerce has joined with the Department of Justice in proposing an amendment to S. 734 that we think will make it even more workable, and while we have no particular objection to S. 795, we think that S. 734 is, in fact, the preferable route to go.

I thank the chairman for this opportunity to present my comments.

The CHAIRMAN. Mr. Unger, in your prepared remarks you reference the fact that one reason small- and medium-sized American businesses do not engage in export activities more than they do is that our antitrust laws often pose a substantial obstacle.

Mr. Baxter, on the other hand, notes in his testimony that it is the Justice Department's view that antitrust concerns over export trading activities are largely unfounded, and he cites the recent efforts by the Antitrust Division to dispel these concerns through such means as the publication of the 1977 Antitrust Guide for International Operations. Others have cited a 1980 report by the Commerce Department and the Office of the Special Trade Representative which did not list the antitrust laws among the major export trade disincentives.

Could you perhaps go into any information you have learned which bears on your statement regarding the antitrust laws as an export obstacle?

Mr. UNGER. Yes, sir. The laws themselves, for one learned in antitrust laws, are not an export disincentive. However, they are for most small and medium-sized manufacturers perceived as a disincentive. They are concerned over how they would be applied and whether or not they are, in fact, complying with the law.

It is that perception that keeps the small and medium-sized manufacturers from getting into export trade. There are a number of other reasons; this is one of them, and it is this concern that they may be exposed to a treble-damage suit that they would have to defend. These suits are expensive. I would volunteer that before I came into the Government I made my living with some of those suits.

THE CHAIRMAN. Professor Baxter, there has been much comment about the fact that since the Antitrust Division instituted its expedited business review procedure for export-related matters, only one such request for an expedited business review has been received.

Do you have any opinion as to why this procedure has not been utilized more by the business community? And, along these lines, do you think the business review procedure itself could be changed in any way to make it more attractive, such as making it more binding than it is today?

Mr. BAXTER. I do not think it is the inadequacy of the binding characteristics of the procedure that accounts for that fact, Senator.

I think in the case of the larger firms that have good antitrust counsel, they feel quite able to give the companies the guidance they need. They are familiar with the positions of the Department. In some senses, they do not need our procedure. And, since in order to invoke our procedure it is necessary to put a lot of your private business down on the public record, they are rather reluctant to do that.

In the case of the smaller firms, I suspect that awareness that our procedure is there and the sophisticated knowledge that would be necessary to take advantage of it may not be readily available to them.

It is, I think, the smaller firms that may face a perceived barrier to export activity—to realizing the scale economies that are necessary. To hire specialized foreign brokers, to deal with ocean transportation problems which are unfamiliar to them, to comply with the marketing laws that prevail in Europe, one has to hire a certain amount of specialized talent and counsel, and a small company simply may not have the scale that is necessary to justify that. So these small companies may have to get together in joint-venture groups in order to attain the scale that does permit hiring those specialized types of resources.

There are some lower court cases that suggest joint ventures among horizontally related companies are illegal, per se. Those cases seem to me clearly and dreadfully wrong. Nevertheless, cautious counsel might find them troublesome when counseling a company. It is precisely this type of problem that both S. 734 and the amendment which we jointly support is intended to address.

Mr. CANNON [acting chairman]. Professor Baxter and Mr. Unger, with your permission, I will continue with the questions Senator Thurmond has for you in his absence.

Professor Baxter, I note that in the last page of your prepared testimony you reference that the Justice Department and the Commerce Department are recommending that the Export Trading Companies Act, which is now S. 734, be amended to generally deny certification to associations and export trading companies whose members comprise 50 percent or more of the domestic market for a product or service they are exporting unless certain conditions of supervening importance are met.

Could you expand on that statement a little bit for us and specifically give us an idea of what the Department would consider a condition of supervening importance?

Mr. BAXTER. Yes, I would be happy to do that.

I have a copy here of the proposed amendment to S. 734 which may be appropriate to submit into the record at this time.

Mr. CANNON. Without objection, it will be inserted at this point.

[Amendment follows:]

AMENDMENT TO THE EXPORT TRADE ASSOCIATION ACT OF 1981

1. Amend sec. 206(a) by inserting in section 4. CERTIFICATION, subsection (b) ISSUANCE OF CERTIFICATE, a new paragraph (2) as follows, and renumbering the following paragraphs in subsection (b) accordingly:

"(2) LIMITATION ON CERTIFICATION OF CERTAIN EXPORT TRADE.--

"(A) Except as authorized by subparagraph (B) of this paragraph, the Secretary will not certify the export trade in goods, wares, merchandise, or services of an association or export trading company whose members' aggregate sales at the time of application for certification, with regard to such goods, wares, merchandise, or services, exceed 50 percent of the total sales of such goods, wares, merchandise, or services in the United States.

"(B) The Secretary may certify the export trade in goods, wares, merchandise, or services to which the preceding subparagraph applies if he determines that (1) a less inclusive membership in the association or export trading company would materially inhibit (a) the attainment of economies of scale in exporting such goods, wares, merchandise, or services, (b) penetration of foreign markets, or (c) an increase in the level of exports that would otherwise occur, and (2) the inclusive membership will not substantially lessen competition within the United States with respect to the goods, wares, merchandise, or services proposed for export and will not otherwise be inconsistent with the requirements of section 2(a) of this Act.

"(C) For the purposes of this subsection, the sales of any person controlling, controlled by, or under the common control of any member of an association or export trading company shall be attributed to such person.".

2. Amend sec. 206(a) by inserting in section 4. CERTIFICATION, subsection (e) ACTION FOR INVALIDATION OF CERTIFICATE BY ATTORNEY GENERAL OR COMMISSION, after "section 2" each time it appears in paragraph (1) the following: "or section 4(b)(2)".

3. Amend sec. 206(a) by inserting in section 4. CERTIFICATION, subsection (e) ACTION FOR INVALIDATION OF CERTIFICATE BY ATTORNEY GENERAL OR COMMISSION, after "section 2" in paragraph (3) the following: "or the requirements of section 4(b)(2)".

Mr. BAXTER. Basically, the notion is that joint ventures that include very, very large shares of the domestic markets pose a high risk of anticompetitive behavior in those domestic markets.

On the other hand, it seems that it would only rarely be necessary to aggregate so large a fraction of the U.S. market in order to attain the economies of scale to which I referred in my last answer.

Nevertheless, it may on rare occasions be necessary to aggregate more than 50 percent. So the proposed amendment makes that possible if those unusual circumstances prevail.

Thus, the amendment provides that the Secretary may nevertheless certify an export trade joint venture whose members hold more than 50 percent of the domestic market if he determines that a less inclusive membership in the association would inhibit the attainment of the necessary scale economies, or the penetration of foreign markets, or an increase in the level of exports that could otherwise be attained, and if he also determines that the inclusive membership will not substantially lessen competition within the domestic markets.

We think that provision is carefully crafted to address the problem that exists, and the Justice Department is prepared to support it.

Mr. CANNON. Mr. Unger, you note in your testimony that the provisions of S. 795 parallel certain provisions of the Webb-Pomerene Act. If this bill were enacted, do you feel it could take the place of Webb-Pomerene and thus the Congress could safely repeal that law?

Mr. UNGER. No, I do not think so. While it parallels, I do not think it would effectively be repealing it.

Mr. CANNON. Not effectively repeal, but could the Congress repeal it?

Mr. UNGER. If it were to pass S. 734 as well.

Mr. CANNON. Thank you, sir.

That is all the questions the Senator had on this. Thank you. Without objection, your prepared statements will be included in the record at this point.

[Material follows:]

TESTIMONY OF

WILLIAM F. BAXTER
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

Mr. Chairman and members of the Committee: I am pleased to be here today to present the views of the Department of Justice on S. 795, the "Foreign Trade Antitrust Improvements Act of 1981." The past few years have seen considerable debate over the proper relationship between United States export trade policy and domestic antitrust enforcement. I am most happy to see the Senate Judiciary Committee actively participating in this debate.

S. 795 would amend the antitrust laws to provide explicitly that the Sherman Act shall not apply to conduct involving trade or commerce with any foreign nation unless such conduct has a direct and substantial effect on trade or commerce within the United States or unless the conduct has the effect of excluding a domestic person from trade or commerce with a foreign nation. The bill would also amend the Clayton Act to provide that Section 7 will not apply to joint ventures limited solely to export trading in goods or services.

The apparent purpose of S. 795 is to reduce uncertainty as to the application of the antitrust laws to export trade activities. Concern that joint export activities would violate the antitrust laws, or at least generate costly litigation, has been cited as a deterrent to such activities and as an inhibiting factor in export trade. Before turning to the merits of S. 795, I would like to repeat again the firm view of the Department of Justice that these concerns are largely unfounded, and note the steps taken by the Department to try to dispel them.

The Department of Justice has for many years held to the view that American enterprises do not incur a significant risk of violating the antitrust laws when they engage in export joint ventures or any other joint activity the sole purpose of which is to sell goods or services for consumption abroad. To be actionable, joint export activity must have a substantial and

foreseeable anticompetitive effect on United States domestic or foreign commerce. Joint activity that is conducted in a manner that does not adversely affect competition in the United States or substantially restrain the export trade of others is not likely to raise serious questions under American antitrust laws.

We have tried in many ways to dispel uncertainty in this area, and to correct what we believe to be clearly mistaken impressions as to the reach and prohibitions of the antitrust laws in export trade contexts. Officials of the Antitrust Division have testified before congressional committees and given numerous speeches on this subject. The Department has recently published two sets of guidelines related to export trade activity--the 1977 Antitrust Guide for International Operations and the 1980 Antitrust Guide Concerning Research Joint Ventures--which seek to explicate through text and examples both Antitrust Division enforcement policy and our understanding of current antitrust law relating to export trade and research joint ventures. In addition, the Division has had, since late 1978, a policy of providing export related business reviews within thirty business days after receiving all necessary information about a specific proposal. Finally, a joint letter from the Departments of Justice and Commerce describing the expedited business review procedure and enclosing a copy of the Antitrust Guide for International Operations was sent to 35,000 businesses and trade associations in 1979.

The Antitrust Guide for International Operations in particular tries to make clear that where there is no reason to suspect that an export joint venture or other joint export activity would eliminate competition in the United States or foreclose export opportunities for other U.S. firms, the activity is not an antitrust problem. As the Department stated in the Guide:

> Normally, the Department would not challenge a joint venture whose only effect was to reduce competition among the parties in a foreign market, even where the goods or services were being exported from the United States. The rules are even less stringent

> where a limited 'one shot' type of venture is involved. . . . Such short-term consortia are useful where large risks or dollar amounts are involved (as with a multiple bank loan or securities underwriting) or where complementary skills are required (as with the typical construction joint venture).

We believe that our efforts to clarify the antitrust ramifications of joint export activities have been of considerable help to American businesses and their counsel. Nevertheless, we continue to hear that members of the business community are foregoing export opportunities involving joint activities for fear of the antitrust laws. While we remain firmly convinced that it is misperception rather than reality that is causing any such timidity, we have no objection to legislation intended to further reduce the uncertainty remaining in this area.

S. 795 appears to move in this direction. We understand that this bill is not intended to work any significant changes in the law, but rather to restate current enforcement policy and judicial interpretations governing the applicability of the antitrust laws to joint export activity. Nonetheless, S. 795 contains provisions that would become part of the substance of those laws, and any such legislation should be approached cautiously and drafted carefully to avoid any unintentional change in the antitrust rules that protect American markets and consumers. Thus, we ask the Committee to scrutinize the bill most closely.

We have studied S. 795 carefully, and we believe that it is basically consistent with Department of Justice enforcement policy. The bill's requirement of a "direct and substantial effect on trade and commerce within the United States" before export trade activities could potentially violate the Sherman Act is also an accurate statement of what we believe to be correct judicial doctrine.

We do, however, have several questions as to particular language in the bill. The current Webb-Pomerene Act requires that in order to be exempt from the Sherman Act, activities of an export trade association must not be "in restraint of the export trade of any domestic competitor of such association."

S. 795 provides that foreign trade conduct, to be exempt from the application of the Sherman Act, must not have "the effect of excluding a domestic person from trade or commerce with [a] foreign nation." The language of S. 795 might be argued to require the total and absolute exclusion of a domestic competitor from foreign markets, as opposed to a substantial restraint on the export trade of such a person, before the Sherman Act could be invoked. We do not believe that the total exclusion of competitors from foreign markets should be required before a violation of the Sherman Act can be made out, nor do we believe that such was the intention of the authors of S. 795. We urge the Committee to consider alternative language that clearly preserves the reach of the Sherman Act with respect to restraints that may fall short of total exclusion.

We are also uncertain as to the intent of Section 3 of S. 795, which would make Section 7 of the Clayton Act inapplicable to "joint ventures limited solely to export trading, in goods or services, from the United States to a foreign nation." First, while the term "joint venture" may adequately convey a general concept for some purposes, it is not a term of art that so clearly applies to certain types of joint business activity and not to others that it can readily be used, without further definition, to describe the boundaries of Clayton Act applicability. Since the intent of the bill is to clarify the application of the antitrust laws in the export area, we would counsel against the use of terms that might introduce new ambiguities. Second, and perhaps more fundamentally, Section 3 raises a question as to whether the Committee perceives a difference between the "domestic effect" standards applicable in Sherman Act contexts and those applicable in Clayton Act contexts. An alternative overall approach, which in the Department's view would be preferable, would be to simply state that the antitrust laws in general do not apply to activities that do not have a direct and substantial effect on United States commerce.

While the Department of Justice thus has no objection to legislation along the lines of S. 795, I should note the Department's support for legislation embodying the concepts of S. 734, which has already been passed by the Senate. Substantively, Title II of S. 734, the antitrust title, is, like S. 795, intended primarily to restate current antitrust law and enforcement policy in the export trade area, rather than to work any significant change in that law. Procedurally, however, Title II of S. 734 goes one step beyond S. 795 in authorizing the grant of certificates that would provide antitrust immunity for specified conduct of export trade associations, and export trading companies created by Title I of the bill, that meets established antitrust standards. The merits of applications for such certificates would be determined by the Secretary of Commerce, in consultation with the Attorney General and the Federal Trade Commission. This procedure would provide a degree of antitrust certainty and assurance beyond that provided by legislation such as S. 795.

The provisions of S. 734, particularly the participation of the antitrust enforcement agencies and other competitive safeguards in the legislation, go a long way toward reconciling the need for export promotion with the need to preserve important domestic antitrust goals. However, because S. 734 provides absolute antitrust immunity for the conduct specified in a certificate of exemption issued under the new procedure, the Department and Administration are recommending that it be amended to generally deny certification to associations and export trading companies whose members comprise 50 percent or more of the domestic market for a product or service that they are exporting, unless certain conditions of supervening importance are met. Absolute antitrust immunity for certain activities regardless of their domestic consequences, as distinct from the conditional antitrust immunity presently available under the Webb-Pomerene Act, presents a degree of domestic risk that must be minimized. Obviously, the possible risk of anticompetitive restraint of a domestic

market increases as does the percentage of that market controlled by those engaged in joint export activity. Thus, we believe that where the members of an export trade association or export trading company comprise a majority of the domestic market in a good or service being exported, there should be a presumption against granting absolute antitrust immunity for their joint exporting conduct. We have worked with the Department of Commerce to draft an appropriate amendment to S. 734 along these lines, and we would be pleased to provide the Committee with a copy. With such an amendment, we support passage of S. 734.

This concludes my prepared statement. I will be happy to answer any questions that the Committee may have.

STATEMENT OF SHERMAN E. UNGER, GENERAL COUNSEL
U.S. DEPARTMENT OF COMMERCE
BEFORE THE SENATE JUDICIARY COMMITTEE

JUNE 17, 1981

MR. CHAIRMAN and members of the Committee, I am pleased to be here to present the views of the Department of Commerce on the Foreign Trade Antitrust Improvements Act of 1981 (S. 795), a bill designed to exempt certain export conduct from the Sherman Act and from Section 7 of the Clayton Act.

Exports play a vital role in the U.S. economy. They pay for the oil and other commodities we must import. They preserve and create jobs in the United States.

At present, 80 percent of the goods we export are the products of one percent of American firms. Our largest U.S. corporations are the ones that are now engaged in export activities. If we are to offset U.S. trade deficits by export expansion, we must develop new ways for the small and medium sized American firms to export their products.

The reasons these firms do not export include lack of exporting know-how; unfamiliarity with foreign languages, currencies and markets; and insufficient capital. Where these impediments can be overcome, however, the uncertainty that exists under our own antitrust laws often poses yet an additional, and substantial obstacle.

The authors of S. 795 recognize that we must modify the impact of our federal antitrust laws on export activity in order to stimulate exports. S. 795 addresses the problems by providing a general exemption from the Sherman Act for conduct involving

trade or commerce with a foreign nation. However, the exemption would not apply (and the conduct involving trade or commerce with a foreign nation would remain subject to the Sherman Act) if --

(1) "such conduct has a direct and substantial effect on trade and commerce within the U.S." (S. 795, sec. 2)

(2) such conduct "has the effect of excluding a domestic person from trade or commerce with such foreign nation." (S. 795, sec. 2)

The proposed amendments resemble existing provisions of the Webb-Pomerene Act, and attempt to restate current case law and practice with respect to the reach of U.S. antitrust enforcement. Section 2 of S. 795 is comparable to Section 2 of Webb-Pomerene which provides that the Sherman Act will not apply to "an association entered into for the sole purpose of engaging in export trade" or to agreements or acts done in the course of export trade by that association. This exemption does not apply if the result is (1) restraint of trade within the U.S. or (2) the restraint of export trade of a domestic corporation.

Similarly, section 3 of S. 795 parallels section 3 of Webb-Pomerene, which provides that section 7 of the Clayton Act does not prohibit the ownership or acquisition of stock in a corporation organized solely for the purpose of engaging in export trade unless such ownership or acquisition restrains or substantially lessens competition within the U.S. Until the last Congress, section 7 of the Clayton Act referred exclusively to "corporations." In Public Law 96-349, Congress

substituted the word "person" for "corporation" each place it appeared in section 7 of the Clayton Act. As certain non-corporate mergers and acquisitions involving joint ventures are now explicitly covered by section 7, section 3 of S. 795 clearly indicates that joint ventures formed solely for export trade are not prohibited by the Clayton Act.

Even if S. 795 accurately restates existing law, it still leaves the exporter with considerable uncertainty. For example, enactment of S. 795 would not help a particular small business to know whether its export activity "has a direct and substantial effect on commerce within the U.S."

Currently, the business community has the perception that under existing law, collective export activity may give rise to liability under the antitrust laws. Although there may be some dispute as to whether this perception is in fact correct, this perception -- even if erroneous -- inhibits collective export activity.

This problem is compounded by the ever present threat of private antitrust suits. Those persons who believe themselves injured by collective export activity are not bound by the Justice Department's view to the contrary. They may seek redress in the courts, thereby exposing exporters to legal and related defense costs.

While a "business review letter" from the Department of Justice may provide assurance that the Attorney General will not attack the conduct, such letter will not be binding on future Attorneys-General nor will it bar private antitrust litigation from those allegedly aggrieved by the conduct.

There is, however, a different bill which provides would-be exporters with the desired certainty. It would make a vehicle available by which these exporters can, by disclosing their contemplated activities in advance, obtain a ruling as to the propriety of their conduct under our antitrust laws. This ruling would be binding both on the federal government and on potential private claimants. In so doing, it does not rely upon the political tides nor on mere non-binding administrative opinions.

I am referring to Title II of S. 734, the Export Trade Association Act, which unamiously passed the Senate this past April. The certification procedure contained in S. 734 addresses these concerns in a manner which provides the required certainty, while at the same time reaffirms the integrity of the antitrust laws for activity affecting U.S. commerce.

Certification -- which provides a listing of those activities deemed within the scope of the antitrust exemption -- offers a far more satisfactory solution to the problem of antitrust clarification and offers maximum protection from treble damage suits.

Also, the Department of Justice and the Federal Trade Commission have an important consultative role in the certification process and retain full authority to investigate and seek to amend or invalidate the certificate.

Moreover, the certification procedure assures that the goals of the legislation -- export promotion -- are met as that is a

condition for certification eligibility. This is not a requirement for antitrust exemption under S. 795.

The limitations on antitrust immunity contained in S. 795 are similar to the limitations on eligibility for certification under S. 734. However, it is the certification procedure contained in the latter bill which is truly responsive to the needs of potential exporters, especially small and medium sized businesses. We believe that if we are to improve our ability to compete for export business world-wide, the provisions of S. 734 represent the most effective means to accomplish this purpose.

Mr. UNGER. Thank you very much.
Mr. BAXTER. Thank you.

OPENING STATEMENT OF SENATOR CHARLES McC. MATHIAS, JR.

Senator MATHIAS [acting chairman]. Gentlemen, I am sorry for the interruption which has slowed you down. I was at another committee meeting in which we were examining the qualifications of judges or perspective judges for elevation to the Bench which delayed my arrival here.

This is a subject in which I have been enormously interested for a long time. I think that it goes to the very heart of the ability of the American economy to compete in an increasingly competitive world, and I think this is a very pregnant moment at which to examine the antitrust rules under which American companies are expected to operate in competition with other economies and, at the same time, to examine the rules as they affect foreign companies which are competing within the United States or within our recognized trading areas.

Our next panel includes the Honorable Robert Pitofsky who, until recently, served as a member of the Federal Trade Commission and is now a professor of law at the Georgetown University Law Center and counsel at the firm of Arnold & Porter.

It is also a pleasure to welcome Mr. Joel Davidow who has recently completed 14 years of service with the Antitrust Division where he served as chief of the Foreign Commerce Section and as chief of the Office of Policy and Planning. We are pleased also to have here with us today Mr. Howard Fogt, who is a partner in the firm of Foley, Lardner, Hollabaugh & Jacobs, who has had a great deal of experience in dealing with Webb-Pomerene associations, and who can tell us with some precision exactly what our proposed Webb-Pomerene legislation would do on the street and in the field.

Gentlemen, will you proceed? Do you have any choice as to who goes first?

Incidentally, let me direct the reporter that all statements will appear in full in the record, and you are free to summarize them briefly.

STATEMENT OF ROBERT PITOFSKY, ESQ., PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER; AND COUNSEL, ARNOLD & PORTER, WASHINGTON, D.C.

Mr. PITOFSKY. Thank you, Senator Mathias.

I appreciate this opportunity to express my views on S. 795. I appear today to support passage of that bill. I have submitted a prepared statement, and this morning I will simply summarize my remarks.

I think virtually all of us here will proceed from a common premise, and that is that the economic and political well-being of the country depend on a healthy foreign trade.

Senator MATHIAS. If I could interrupt at this point, just to emphasize that point, I recently had a projection of the needs of this country for an increased foreign trade—that unless we increase exports tenfold, by the end of the century we will not be able to

pay for the energy that we are going to have to import just to keep going.

Please proceed.

Mr. PITOFSKY. That is a striking figure, and I am sure it is accurate.

I think most of us also feel that at least in recent years the country has not been doing all that well competing in foreign markets and against foreign companies in domestic markets.

I gave a speech about a month ago pointing out that American foreign trade in the late 1970's was down 23 percent and that something like 2 million American jobs had been lost to foreign companies.

While I say those things, I want to put the figures in perspective. First, the United States is not doing all that badly either. It is still the leading exporter in the world. Also, while I think there has been a slump in export trade, I would not agree that antitrust is the principal cause. I think it is not irrelevant, but certainly there are other factors that are more important.

Why, then, support legislation relating to antitrust if it is not the principal problem? First of all, as I said, it is not irrelevant—it is part of the problem. This bill, it seems to me, addresses three aspects of that problem.

First, my experience has been, as Mr. Baxter and Mr. Unger testified, that many businessmen are honestly uncertain as to the reach of the antitrust laws. The question of extraterritorial reach of the Sherman Act has been addressed by a number of courts of appeal, some of them in opinions that are difficult to reconcile. The Supreme Court has not looked at this question in almost 50 years.

Some businessmen believe that the antitrust laws require that they compete in exactly the same way and to exactly the same extent when they are doing business abroad as when they are engaging in transactions in the United States. That is not right, but they think so. The provisions of this bill, which will make it clear that the antitrust laws do not apply unless the conduct has a direct and substantial effect on domestic commerce, should help to nail the point down.

Second, it may be the case—it probably is the case—that some rules that we apply domestically to certain kinds of transactions would be overly stringent if we were to apply them in foreign trade.

Mr. Baxter referred to the example that I was going to use. There are some cases which have said with respect to international joint ventures that they are close to being illegal per se. I do not think that is right. The Department of Justice's foreign trade guidelines made it clear the Department does not feel that way, but those opinions are on the books.

It seems to me, again, that this bill, which will clarify the point that joint ventures in foreign trade will be covered by the Sherman Act but not the Clayton Act, should clarify existing law and remedy any prior errors with respect to joint venture antitrust enforcement.

Third and perhaps most important, it strikes me as a general matter that we need to rethink antitrust enforcement involving foreign transactions. There are a number of commentators, judges,

and enforcement officials who take the position that the antitrust laws ought to apply in exactly the same way when a foreign transaction is involved as a domestic transaction, and I think that is just not right. There are too many differences with respect to foreign trade.

Senator MATHIAS. The whole marketplace is different.

Mr. PITOFSKY. Exactly, there are currency differences, diplomatic differences, language differences, geographic boundary differences.

Senator MATHIAS. And structural differences in the economy, in the climate, and in the environment in which you are competing.

Mr. PITOFSKY. Yes—also differences in the kind of companies that you meet in foreign markets, some of which are state-owned, and so forth.

Therefore, it strikes me as essential that judges and enforcement officials continue—I will not say "begin" because I think they are doing it already—to reappraise antitrust when we leave domestic markets.

I would hope that a bill like S. 795 would be a signal to enforcement officials and judges of Congress judgment that antitrust enforcement is different when we are talking about foreign markets.

In saying these things and supporting the bill, I do want to note three other points: My view here is that Congress goal ought to be to modify antitrust, not to flatten it.

The idea is not to reject the premises underlying the Sherman Act—that monopoly and cartels will lead to inefficiency and consumer loss—but rather to reexamine the details of antitrust and see if they apply equally in foreign trade.

Senator MATHIAS. This is right on as far as I am concerned. Antitrust is an important concept embodying the idea of avoiding monopoly which is, in the long run, a drag on the economy and leads to inefficiencies. But we are talking here about a different environment. John Sherman was a great Republican Senator and great Secretary of State, but his eminence and distinction do not hide the fact that he lived a century ago, that the economic conditions in the world have changed tremendously in that century, and that it is time for review.

Mr. PITOFSKY. That is right.

That leads me to my second point. I think it is just commonsense to reappraise antitrust when it is applied abroad, and I note that any changes that will be made by this bill are only likely to bring American antitrust enforcement in line with the antitrust enforcement of our trading partners.

I know of no country which has applied its antitrust laws with the extraterritorial reach that we have applied our antitrust laws in previous years.

I listed in my testimony four major countries—Japan, West Germany, France, and the United Kingdom—each of which, when they apply their antitrust laws, take into account whether it is a domestic or a foreign transaction. If it is a foreign transaction, their laws are more lenient. It seems to me that the premise of this bill and of Congress's review is exactly that.

Third, I do want to emphasize that a bill like this is not, in my view, designed to create a free fire zone every time an American company goes abroad. If transactions are entered into or arrange-

ments made with respect to export arrangements in France and the American antitrust laws do not apply, it does not follow that antitrust principles do not apply.

There is no reason why French antitrust law or Common Market antitrust law will not apply. We have seen developments in foreign antitrust law in the last 10 or 15 years, and we know that those laws are being enforced more vigorously.

For all these reasons, I am led to support this bill. I think it is a modest and measured response to an important problem.

I included in my testimony some suggestions about the language of the bill. I will not review those here, except on one point.

The second provision with respect to jurisdictional reach talks about the antitrust laws only applying in situations in which a domestic person is "excluded". That seems to me to be language which is too absolute.

An American company could easily be injured in its competitive efforts by a cartel among other companies, even though it is not completely excluded, and I have suggested in my testimony that perhaps the language in the other provision of the bill—"direct and substantial effect"—might be a better approach to this problem than the word "excluded."

Thank you very much.

Senator MATHIAS. Thank you very much.

Mr. Davidow?

STATEMENT OF JOEL DAVIDOW, ESQ., MUDGE, ROSE, GUTHRIE & ALEXANDER, NEW YORK, N.Y.

Mr. DAVIDOW. Senator, I hesitate to compete in antitrust expertise with the head of the Division and a former Commission of the Federal Trade Commission.

I bring to this hearing some specialized experience which I think others could not have exactly and thus I should perhaps concentrate on what insights that has given me.

Those insights do suggest a skepticism about the wisdom of this bill and a feeling that some other legislation now before the Congress is preferable to it.

In addition to being in charge of international antitrust enforcement for the Department of Justice for some time, I was its delegate to a series of meetings with other countries on international antitrust principles at the OECD and the United Nations.

Senator MATHIAS. So you are well aware of their sensitivity on the subject?

Mr. DAVIDOW. Yes; though there are mixed feelings.

S. 795 AND AMERICA'S INTERNATIONAL COMMITMENTS

Although American antitrust is a sensitive subject, the appeal of Senator Sherman's logic, and the desire for a world trade that has free market principles seem to continue. The OECD passed antitrust guidelines for multinationals in 1976, and in December 1980 the United Nations General Assembly unanimously adopted a United Nations antitrust code of conduct which suggests that every nation in the world should pass an antitrust law, that it should be based on the principle of competition, and that it should treat all

companies—and this was a point that we insisted on—without discrimination.

In fact, U.S. business urged me as the negotiator—that this code, even though voluntary, should be rejected unless it had the principle that all corporations should be treated under antitrust laws without discrimination based on nationality, though perhaps investment laws or other laws could distinguish between a foreign and a domestic company. But the antitrust laws, the United States insisted, should operate without discrimination.

The developing countries also contended that the large, rich countries had absolutely no concern for the smallest, poorest countries and that to aim an export cartel at a developing country was an improper act in an age that needed the development of the poorest and least developed countries.

The fixing of prices in export trade was condemned in the code unless authorized by governments, and it was stated specifically in the unanimous code that all governments should, within their competence of their antitrust laws, attack any restrictive practice that had an adverse effect on international trade, particularly on the trade and development of developing countries.

So there was an emphasis in the code on the use of antitrust laws in such a way as to stop restrictive practices that might injure world trade and might injure developing countries.

It is somewhat disturbing, shortly after the unanimous adoption of that code, to have the United States consider legislation which appears—though it is not clear—to be aimed at cutting back the competence or application of its antitrust laws.

S. 795 AND THE PROTECTION OF U.S. INTERESTS

As I point out in my testimony, I have some question whether that is in our own interest—not only our foreign policy interest but also our economic interest. Let me give two examples.

There is a recent case involving Gulf & Western and a company called Dominicus Americanus. The merits of the case are difficult to say—there was a CBS special—but the suggestion was that certain American investors wanted to invest in the Dominican Republic and that a larger competitor tried to deny them the market.

There is a question whether the American antitrust laws should apply to this struggle between two American companies in a small country that is incapable of enforcing antitrust laws seriously in such a case itself. The judges will work that out.

But the question, in essence, is whether they work it out or whether Congress tries to intervene directly by changing the law.

The second example, which I think is somewhat clearer, goes back to a case like the Concentrated Phosphate decision of the U.S. Supreme Court. In that case, there was a question whether export activity directed toward a foreign country was legal or illegal if U.S. dollars through AID funds were paying for the product.

In other words, we give aid to India to buy fertilizer. American fertilizer companies now form a cartel to double the price of fertilizer to India. The American taxpayer pays for these price increases.

If you say that the sole test is whether there were domestic effects to this, then you leave the courts with a difficult question: Is the spending of AID funds a "domestic effect"?

I think it is quite possible that they would say no—that this bill, read literally, reverses the Supreme Court decision in Concentrated Phosphate.

To take another example, assume we encourage Egypt to build an airbase in the Sinai that we would eventually want to use and we find that three American offshore engineering companies have formed a bidding conspiracy to rig the bids on this airbase.

Obviously, we have an interest in that problem, but that interest is not precisely its effect on our domestic commerce, it is its effect on our long-run interests.

When we leave the law as it is, we leave the courts with a very broad flexibility in determining what antitrust cases have effects on U.S. persons or U.S. interests. At this point, the only test is the effect on commerce.

If we seem to be cutting back that test by saying "direct, substantial effect on U.S. person," et cetera, we may be signaling the courts to be inflexible in seeing what the real interests are.

TECHNICAL PROBLEMS IN S. 795

I noted in my statement that of four groups who testified before the House on this bill, although they all tended to favor it in principle, they all suggested wording changes which in one way or another said there was one or another possibility that the bill might not catch, or that it might go either too far or not far enough.

It is difficult to write a bill telling the courts, in general, when to apply to a law and when not, when to find an adequate amount of contact.

Our courts have in recent decisions, like the *Timberline* case, said that the application to a foreign transaction involves the weighing of a great variety of interests—a kind of balancing process.

It is quite possible for courts to balance. It is certainly possible for the Justice Department in its enforcement to balance interests. It is very difficult to write a perfect sentence in a bill that exactly balances those interests and tells you when you would want the bill applied and when you would not.

S. 795 COMPARED TO ALTERNATE BILLS

As I point out in my testimony, Congress has four choices in this area that I see. The first is to be content with a statement of views, or whatever, and to leave international discretion in antitrust to diplomacy, to the agencies, and to recent decisions of the courts.

I personally see quite a lot of progress in all those areas and think the Congress could well make the decision not to pass any legislation this year.

A second choice is to decide that since we have is a series of alternatives such as a bill to amend the Webb-Pomerene Act in one of two or three ways such as S. 734, and a bill like S. 795 to which five different groups have suggested five amendments—that the

preferable approach now is the Mathias bill, S. 1010 of last year, to set up an antitrust commission of experts so that they can take these alternative bills, weigh in the various international commitments, and come back in a year with a very careful analysis of legislation and its effects, and giving another year to the courts and the Agencies.

In my judgment, the second preference to no bill would be the Mathias bill.

Senator MATHIAS. Those words are as welcome as they are generous.

Mr. DAVIDOW. Thank you.

The third choice, if we are to do something with export trade, is to deal directly with an amendment. I make there a very specific point:

There is a danger in any country trying to encourage joint export by its nationals of creating a kind of trade war—of going back to a kind of protectionism that says every country will try to operate in international trade as one huge cartel. That is a step back from the kind of liberal trading system the United States has generally favored.

Even there, besides trying to discourage this tendency, the free world countries in 1974 in the OECD passed unanimously a formal recommendation concerning export cartels, and they said specifically that all export cartels should be registered so that both the domestic antitrust enforcers and the foreign government faced with the cartel at least knew it existed and that it was dealing with one.

By possibly changing our law to say not that American exporters must register to sell abroad but, instead, saying they are completely exempt whether they register or not as long as they avoid domestic effects, one can encourage secret bidding cartels that are unknown both to the Justice Department and to the foreigners to whom they sell.

In that sense, it would seem to me much more consistent with good antitrust policy and with good relations with our allies to stick with a system—even a broadened one—of registration with the Commerce Department than a system which seems to imply that the antitrust laws do not apply at all to foreign activity and no registration is necessary.

For this reason, I, like Professor Baxter, the Assistant Attorney General, would rank S. 734, the amendment to the Webb-Pomerene Act, as a preferable bill to S. 795.

I would also point out that S. 734 could be preferable to American industry in this sense: The Common Market or any other country that passes an antitrust law based on an effects doctrine could conceivably seek sanctions against foreign exporters who cartelize in selling to that market.

That is, an American exporters association can conceivably be sued by the Common Market. In fact, Mr. Fogt's client has been under investigation by the Common Market.

Under the recently expanded doctrine of international comity, our courts have suggested that a country should take into account the degree of approval by another country in determining whether to impose fines on enterprises.

If an American group of exporters has a certificate from the U.S. Commerce Department approving their joint export arrangement, they can use that in the Common Market or some other country to demand some kind of international comity in their favor.

If they go before a Common Market court and they say: "Well, we don't have any certificate, we have no specific approval, all we have is a statement in S. 795 that the U.S. Government is indifferent to what we do abroad," this gives them very little basis to ask for any serious comity.

I think American exporters would be better off with a certificate under Webb-Pomerene or from the Commerce Department if challenged under increasingly strong foreign laws than they would under an approach like S. 795.

As I said, although I do not find S. 795 a terrible bill, I would rank it last on my choices. Even if it were to be passed, I would suggest, like others, that the word "excluded" be changed to the word "injured" or something of that nature, and there are certain other changes I suggest be made in it.

Thank you.

Senator MATHIAS. I will reserve my questions for the full panel, although the temptation to take each of you on while we are in hot pursuit is very great.

But I cannot resist making the comment that I think you are absolutely right—we cannot be perceived either at home or abroad as abandoning Senator Sherman's principles. Further, it would be particularly ironic if the first Republican Senate in 25 years were perceived as guilty of abandoning the whole basic concept of antimonopoly principle.

Mr. Fogt?

STATEMENT OF HOWARD W. FOGT, JR., ESQ., FOLEY, LARDNER, HOLLABAUGH & JACOBS, WASHINGTON, D.C.

Mr. FOGT. Thank you, Mr. Chairman. I am testifying this morning on behalf of the Phosphate Rock Export Association—Phosrock.

Phosrock commends the committee for its attention to important trade expansion issues. Phosrock believes that S. 795 may be a useful first step in this direction.

The goal of the legislation is to clarify U.S. antitrust laws by clearly limiting their reach to encompass only those activities which have a direct, substantial, and foreseeable effect on domestic or import competition. Phosrock endorses the substantive principles of that legislation.

At the same time, S. 795 should complement other export trade legislation designed to stimulate export trade through clarification of U.S. antitrust laws.

Phosrock strongly supports S. 734. In our view, S. 795 is not a substitute for this important legislation. We believe that S. 734 has a significant practical potential to resolve the legal uncertainties which have frustrated trade expansion efforts through a certification process which will state with detailed particularity export trade activity which is beyond the jurisdiction of U.S. antitrust law.

Moreover—and I join with Mr. Davidow in these remarks—because S. 734 requires registration and preclearance of export trade

activity, the bill provides for responsible governmental oversight of joint export trade activity that has been traditionally considered a necessary predicate to sanctioning such action.

Three principal issues should be of concern to this committee:

First, the legislation must facilitate permissible joint action by U.S. exporters while, at the same time, making every effort to eliminate unnecessary bureaucracy.

Second, if Congress adopts a procedure to certify joint export activity, clear and definitive standards must be employed by the Department of Commerce in processing applications, according automatic certification under appropriate circumstances.

Third, S. 734 recognizes that existing Webb-Pomerene associations should continue their operations unimpeded without having to undergo an unsettling certification process. These associations presumably have conducted their operations in compliance with the substantive provisions of the Webb-Pomerene Act which are intended to remain unchanged by S. 734.

To require them, nevertheless, to justify their continued existence through a certification process would disrupt their operations and jeopardize important customer relations, thus hindering their efforts to compete against foreign rivals.

Simply stated, legislation designed to foster export trade ought not to threaten the operations of the organizations that have been promoting trade expansion for years.

Phosrock recognizes that there are some who object to one or more features of S. 795 and S. 734. We urge that prompt and thoughtful attention be given to possible resolution of these concerns so that a satisfactory compromise can be achieved and that legislation may be passed. Such a compromise should contain the complementary features of S. 734 and S. 795.

With respect to S. 795, there are a number of technical amendments which are appropriate. All of the witnesses who have testified about this legislation have suggested necessary amendments.

Phosrock supports the testimony of the Business Roundtable before the House Judiciary Subcommittee on Monopolies and Commercial Law with respect to H.R. 2326 in this respect.

Regarding S. 734, the major concern which has been advanced relates to the bureaucracy that may be created by the certification process which has been proposed. If this certification process is viewed as unnecessarily bureaucratic, a much more simplified procedure can and should be adopted.

The Chamber of Commerce of the United States has stated that it is considering a number of proposals to simplify the certification process. One alternative under consideration by the chamber is a proposal that is patterned after the 20-year-old negative clearance procedure employed by the Commission of the European Communities.

This Common Market procedure, which has successfully considered thousands of requests for antitrust clearance with only a minimal staff, provides one model for analysis by Congress and the administration as efforts are made to finalize this legislation.

Phosrock, however, opposes the amendment that was proposed this morning by the administration to S. 734 which would make more difficult the certification of associations having more than a

50-percent share of the domestic market. First, there is no historical precedent for such action.

In 1950, in the *Minnesota Mining* case, Judge Wyzansky indicated that Congress had foreseen that substantially all members of a domestic industry could properly participate in an export trade association.

In his floor statement in support of S. 734, Senator Danforth reviewed all FTC adjustment hearings and all judicial precedents under the Webb-Pomerene Act, and none of those cases suggested any domestic spillover occurring simply because of the size of the market share involved in the participants in the association.

There are serious technical and counseling problems that would attend such an amendment. First, how does one define what the market is? Is there to be a minisection 7 litigation before that issue is resolved?

Other problems of counseling include the inclusion or exclusion of members when an association is being formed or when an association has been in operation.

Traditionally, Webb-Pomerene lawyers have counseled their clients that associations not only must be formed and intended to promote export trade but that they should be open to all qualified members. Serious problems could arise in excluding potential members from the association.

With due deference to the chairman's bill which propose an export trade study commission, I respectfully submit that S. 734 has been studied for more than 4 years. It has been the subject of extended hearings. It is time for this legislation to be passed.

I thank the chairman for my period of time.

Senator MATHIAS. Your last comment refers to the rather narrow focus of S. 734?

Mr. FOGT. That is correct.

Senator MATHIAS. And not to the broader aspects of the operation of American antitrust law in a very active and competitive world economy?

Mr. FOGT. That is precisely correct.

Senator MATHIAS. What do you think is developing around the world with respect to antimonopoly practices? I assume that one or more of you have, for example, visited the British Antimonopoly Office in Regents Park and have some sense of the pace, scope, and activity of that office and similar offices in other West European countries that are our trading partners. What is the drift in the world in this respect?

Mr. DAVIDOW. When Mrs. Thatcher became Prime Minister, she dismantled the Office of Price Control that had been previously functioning under the Labour Government in England and announced that she would go to more of a free market and possibly a denationalization approach, and new antitrust legislation was introduced and passed in 1980 in England, though it must be acknowledged that United Kingdom antitrust remains a somewhat small and sleepy operation.

Of course, the United Kingdom, being a member of the Common Market, has most significant transactions subject to the competition law of Brussels in any event.

The French direction is somewhat more difficult to see now. In 1977, France passed merger control and strengthened its antitrust law. It then had an economist as the Prime Minister who was a believer in the free market.

What the Mitterrand government will do in regard to French antitrust law is unclear. They have suggested some return to nationalization of industry.

So these things seem to go up and down, although whether the new, more left-wing government coming in will retreat is unclear. They are certainly committed to staying in the Common Market, and that operation continues very strong.

The strongest example was last year when they caught Pioneer Electronics having resale price maintenance on hi-fi speakers. They fined them $6 million, which is a larger fine than has ever been put out by American antitrust agencies, though I guess we came close to that in the shipping case.

Mr. FOGT. In Japan, the antimonopoly law was enacted, of course, after the Second World War, and for some time was relatively inactive and deferential to MITI. But more recently, the Japanese Fair Trade Commission has become much more active and, for example, has recently indicated that MITI's administrative guidance about certain kinds of restrictive practices might be permitted is simply not going to be a defense under Japanese antimonopoly law.

Mr. PITOFSKY. My impression is that antitrust enforcement is modest but growing in most of the major countries that we regard as trading partners.

I would only add on this that it is not fair, I think, to suggest that if we enact a bill like S. 795 we are somehow betraying the governments we deal with by allowing American companies free rein to cartelize their export trading.

I think we have to recognize that the parties who have most resented the far reach of American extraterritorial jurisdiction are foreign countries. We have seen in a number of these countries in recent years legislation designed to blunt American antitrust enforcement. We have to take that into account in making judgments about the way we enforce our antitrust laws.

Senator MATHIAS. I can appreciate that point. For example, when I introduced an amendment several years ago to reverse the action of the Supreme Court in the case of *Pfizer* v. *India,* the most immediate and vocal reaction that I got was from our friends in Germany who felt that this was an attempt at the extraterritorial enforcement of American antitrust law. That is the other side of the coin that you referred to.

But if, in fact, that is the international reaction, say, to a bill that would reverse the decision in *Pfizer* v. *India,* are your colleagues not right that this bill might be interpreted as a kind of letting off the leash and releasing the buckle?

Mr. PITOFSKY. There probably is no single "international reaction" to something like this.

Certainly, some foreign countries and foreign interests will think that America has behaved sensibly in no longer trying to export into uncongenial areas its own private views of antitrust enforcement. Others may think that we have turned American companies

loose, but all they have to do is enforce their laws. I am in favor of antitrust enforcement and opposed to cartels; the only question is, when that kind of transaction occurs in foreign countries, sometimes with the aid and collaboration of the foreign government, is that our business or their business? It seems to me it is their business.

Mr. DAVIDOW. I cannot agree that this bill will help our relations with foreigners. For instance, the British and Australians who have criticized this have said that the thing they do not like is what they call the effects doctrine.

They would hold American antitrust to be legal, as they see the international law, only if it applies to transactions where at least one overt act occurred on American territory. They say that the American effects doctrine is an illegal doctrine.

S. 795 says specifically that we will apply our law whenever there is a direct and substantial effect, rather than where there is an overt act. So we would simply once again be reaffirming the effects doctrine which they do not agree with.

They have second said that the trouble with our law is that it applies to their nationals and what we do here is, by using the word "domestic person" in the law, suggest that we are going to have a distinction between injury to a domestic person and injury to one of their nationals.

So all we do there is exclude their nationals from being beneficiaries of the law, but we would continue to allow them to be defendants when they injure an American domestic person. I cannot see how this law will get us anywhere with foreigners.

Senator MATHIAS. We deal with a very complex world, more complex than ever before. We are also dealing with more people in that world than we have ever dealt with before.

You have the industrialized world, and you have the Third World, and the Third World is enormously important to us. I think the Third World now takes about 50 percent of our exports, and it is absolutely critical to us as a source of raw materials.

So the Third World may have a different view of this than the Second World, if you can call the industrialized world the Second World.

Mr. DAVIDOW. Yes. The only country I know of that tries to deal with that directly is Japan. The Japanese have empowered their Ministry of Industry—their Commerce Department—to change or alter the behavior of export associations if those associations act in an abusive way in a developing country and injure the foreign relations of Japan.

So you have a tradeoff there. That is, you get a little better ability to change the way your business affects your dealings, let us say, with the Third World, in exchange for more bureaucratic power in the Commerce Department.

That is a hard choice to make because, as you heard Mr. Fogt, most Americans would prefer not to have that degree of Government supervision.

But, on the other hand, if you are going to make distinctions about how you deal abroad based on foreign policy considerations, you need some kind of power. I do not think I could make that choice as an antitrust export, but that is the issue as I see it.

Senator MATHIAS. Which, of course, would lead me, with simple-minded consistency, to say we ought to go back to the concept of a really indepth study of the relationship of antitrust law to the economy of the world as it now is and to try to make some logical decisions after that indepth study.

Mr. DAVIDOW. Let me add one point to that: My feeling is that a lot of the criticism about the ability of American business to compete abroad may go as much to the rules of domestic antitrust than to the rather rare instances when Americans were actually disadvantaged in a foreign case.

For instance, we have the strictest merger rules in the world. That prevents certain domestic mergers which could be useful internationally. So, when you go into the subject of international competitiveness, you really want to look at domestic rules as well as international application.

I think the Justice Department Policy Office is looking at the merger guidelines and direct rules on domestic antitrust as they apply internationally. So I think your study has to be broader than even the three bills that are now before the Congress.

Senator MATHIAS. Can you add anything to that?

Mr. FOGT. I would only add, Mr. Chairman, that we ought not to lose sight of what the principal purpose of this legislation is, and that is to clarify the operating rules for American businessmen so that they can take advantage of whatever export trade opportunities there are. I would allude to the *Concentrated Phosphate Export Association* case, which Mr. Davidow mentioned, as a good example.

AID and its predecessors, following the passage of the Webb-Pomerene Act, literally for decades encouraged Webb-Pomerene associations to participate in AID-financed or U.S. Government-financed transactions. In the midsixties, the Antitrust Division decided that that was an impermissible practice and brought a lawsuit challenging that conduct.

The Supreme Court ultimately determined that Webb-Pomerene association participation in those transactions was inappropriate and was not export trade.

My point is that we need to emphasize the importance of clarifying the groundrules so that American businessmen can go about the business of exporting.

Senator MATHIAS. Of course, clarifying is sometimes a dangerous thing if, by clarifying, you alter the rules rather than merely define them more clearly. It seems to me that is what we want to avoid and that is why we need to know exactly what we are dealing with.

Mr. PITOFSKY. I agree. By the way, I support the study commission that you proposed, as well. There is no reason why one could not support this bill and also the study commission. This is an area where clarity is a virtue of its own.

Senator MATHIAS. I think, if we had the bench full here and I could make that deal today, I would make it.

Mr. FOGT. Mr. Chairman, I would also point out that S. 734, in its own terms, provides for a study commission. After 7 years, there is to be empaneled a commission which is to report to the Congress on the effectiveness.

Senator MATHIAS. I am not arguing with you on that. I am also a sponsor of that proposal.

Mr. DAVIDOW. If I could go back one moment to S. 795 and this point of whether one is merely clarifying, the phrase "excluding" or even "injuring a domestic person," to me, is very troubling on the same ground, I think, that some other speakers before the House mentioned.

I am unclear, if any American company wants to invest abroad through a subsidiary, that is thus a company organized as a foreign person. If one American competitor destroys Exxon-France or IBM-France, obviously, it causes enormous financial loss to Americans, and it is, in fact, the instrument through which we traded or invested abroad. But the person injured is not domestic; it is a foreign person.

Do we mean by "domestic person" anyone owned or controlled by a domestic person, or do we mean that all foreign subsidiaries of American companies, if incorporated abroad, are no longer protected by the antitrust laws?

That would be a radical change in our law, and it is a quite conceivable reading of this new bill and one, I think, that is unintended. I do not think that Congress intended to cut off all American subsidiaries from the protections of the antitrust laws.

But if questions that large come up, then I agree with you—that that is not simply a clarification.

Senator MATHIAS. Thank you very much, gentlemen. You have been very patient in this educational process, and we very much appreciate your time.

Without objection, your prepared statements will be included in the record at this point.

[Material follows:]

STATEMENT OF

ROBERT PITOFSKY*/

BEFORE

COMMITTEE ON THE JUDICIARY COMMITTEE
UNITED STATES SENATE

ON

THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1981 (S. 795)

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*/ Professor of Law, Georgetown University Law Center and Counsel Arnold & Porter, Washington, D.C. Formerly Commissioner, Federal Trade Commission (1978-1981).

Mr. Chairman and members of the Committee, I am pleased to present my views on S. 795, a bill to amend the Sherman and Clayton Acts to clarify the reach of the United States antitrust laws, and to amend current antitrust law to augment the ability of American corporations to compete through joint ventures in foreign markets.

I appear today to testify in support of passage of S. 795. Before turning to the specific provisions of the bill, let me say a few words generally about the need to enact this legislation. It has long been recognized that this country's political and economic well-being depends on a vigorous and successful export trade. Most observers acknowledge that many U.S. industries and companies have been doing less well in recent years in competing in foreign markets, and against foreign firms in domestic markets. Thus, in the last ten years, our share of the world market in manufactured goods has fallen 23%[1/] and two million manufacturing jobs have been lost to foreign trade.[2/]

1/ Robert E. Herzstein, Under Secretary for International Trade, Department of Commerce, Letter to the Editor, New York Times, December 28, 1980, at 12, Col. 4.

2/ Robert Reich, The True Road to Industrial Renewal, The Nation 264, March 7, 1981.

The effect in particular industries is even more striking. For example, imports of foreign cars have risen from 15% to almost 30% of domestic sales.[3/] Similarly, the United States' share of world exports of medical and pharmaceutical products has fallen from 27.6% in 1962 to 16.9% in 1979.[4/]

While these declines are striking, it would be misleading not to put the export situation in some perspective. The United States is still the leading exporter in the world, although it does face more and more vigorous and effective competition in almost every foreign market. I would also emphasize that while there has been some relative decline, it is highly unlikely that antitrust enforcement is a principal factor. Many other explanations have been offered: tax laws, the elimination of a fixed monetary rate of exchange, an out-of-date industrial plant in some industries, the tendency of industrial managers to emphasize short-term over long-term profits, and an alleged decline in American product quality. I'm not

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3/ Subcommittee on Trade of the House, Ways and Means Committee, Auto Situation: 1980, 96th Cong., 2d Sess. 27 (1980).

4/ BUSINESS WEEK, June 30, 1980, at 60.

sure which if any of these factors really has played a major role; I do suggest that if one were making a list, antitrust enforcement would appear as a rather minor consideration.

Why then support legislation to amend the antitrust laws to encourage U.S. companies in their competition abroad? There are a number of reasons, and I believe they are reflected in the provisions of S. 795.

First, some antitrust laws are rather unclear and the absence of a sharp line between legal and illegal conduct is said by many businessmen to impede their efforts abroad. This concern is most frequently voiced on the issue of the extra-territorial reach of antitrust. Many different formulations have been advanced over the years as to which transactions are covered by our domestic antitrust laws.[5/] The Supreme Court has not directly addressed this issue in over 70 years and Court of Appeals and District Court decisions are often difficult to reconcile. In particular, there is a widespread view among American businessmen,

5/ For example, compare United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945) with the more recent formulation in Timberlane Lumber Co. v. Bank of America, N.T. and S.A., 549 F.2d 597 (9th Cir. 1976).

whether justified or not, that they must compete to the maximum extent -- that is to the same extent as if the transaction were a domestic one -- when they seek to do business abroad. Clarification in this area would be a welcome development since it is the uncertainty itself which occasionally may discourage or deter export efforts.

Second, in some particular respects, current rules may be unduly stringent. Joint ventures among domestic companies or between domestic companies and foreign partners is a characteristic device for doing business abroad and it seems to me antitrust enforcement should be relatively lenient. Unfortunately, a few older opinions which take an extremely tough stance toward joint ventures involve foreign trade.[6/] The Department of Justice has put out several sets of guidelines that take a flexible and realistic view, but legislative ratification should help to nail the point down. Again, the provision of S. 795 which addresses that issue should be helpful.

6/ See, U.S. v. Minnesota Mining & Manufacturing Co., 92 F.Supp. 947 (D.Mass. 1950).

Third, there is an unfortunate tendency for many commentators, judges and enforcement officials to apply domestic antitrust rules mechanically to an international trade situation. I think that approach is a mistake. International trade is different in too many ways. The same economic and political assumptions simply cannot always be made. Tariffs, foreign laws, contact with non-free-market economies, transportation difficulties and diplomatic considerations may all change the picture.

Judges could in the common law tradition modify current antitrust enforcement under antitrust's "rule of reason" to take foreign commerce differences into account. Some of this has been going on. But efforts to date have been fairly timid. This legislation, expressly premised on the idea that competition abroad is special -- and that it often makes no sense to apply without reconsideration domestic antitrust rules to foreign competition situations -- should signal congressional recognition of these realities. That in turn should encourage judges in future cases to re-examine some of their antitrust premises when foreign trade is involved.

I delivered a speech last month with some specific proposals for rethinking antitrust enforcement in foreign markets and, with the Committee's permission, will append those remarks to this text.

For the reasons indicated, I support the general direction and policy premises implicit in S. 795. In doing so, however, I think it is important to expressly indicate three additional points regarding this area of the antitrust laws.

A legitimate concern with the impact of antitrust on foreign trade should not be allowed to serve as an excuse to sweep away all or a major portion of relevant antitrust restrictions. As I have already said, antitrust and some of the uncertainties it engenders occasionally may be a minor burden on foreign commerce but it is not the crucial factor. There is no evidence whatsoever that the basic conclusions of the drafters of the Sherman and Clayton Acts, that price-fixing and monopoly leads to decreased economic efficiency and increased cost to consumers, are no longer sound. What is called for is a

reappraisal of the details of antitrust application when foreign markets are involved. I support S. 795 precisely because it is cautious and is directed to specific problems -- jurisdictional reach and formation of joint ventures -- where there is at least some evidence that clarification and amendment could be useful.

It should also be clear that these amendments are not designed to create a free fire zone for American companies when they do business abroad. More and more of our trading partners are enacting and enforcing their own antitrust restrictions. In the past, when the United States has applied its views of antitrust to foreign transactions, it has been subject to charges of "undue intrusion" and of "exporting its economic values" to areas of the world where they are not especially congenial. By withdrawing our hand from transactions which exhaust all market consequences abroad, we allow those foreign countries to decide what quality and level of competition they want to see within their borders.

Finally, I would simply note that the amendments in this bill, and the antitrust philosophy that is reflected in them, would bring the United States more in line with the law enforcement policies of virtually all of our trading partners. On the jurisdictional reach question, I am not aware of a single country which has imposed its antitrust views extra-territorially to anything like the extent that the United States has on occasion imposed its views. Several of our trading partners also recognize -- as this bill does -- that transactions which exhaust their competitive consequences in foreign markets should be treated differently than those that have an internal domestic effect. For example, the antimerger laws of Japan, West Germany, France, and the United Kingdom all take into account the effect of a merger on the country's position in international markets. 7/

I would like to offer now some specific suggestions with respect to S. 795 and related legislation.

7/ Markert, The New German Antitrust Reform Law, 19 Antitrust Bull. 135, 145 (1974); Ariga & Ricke, The Antimonopoly Law of Japan and Its Enforcement, 39 Wash. L. Rev. (1974); Jenny and Weber, The French Antitrust Legislation: An Exercise in Futility?, 20 Antitrust Bull. 597 (1975).

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1. Study Commission. While I believe enough is known about antitrust in foreign trade to support the goals of S. 795, a more comprehensive review is nevertheless justified. I would therefore support the Study Commission concept proposed in H.R. 2459 (previously considered in the Senate as S. 1010) as an important and useful complement to the current legislation.

2. Statutes Affected. Section 2 of the bill clarifying the reach of the antitrust laws applies expressly only to the Sherman Act. To avoid unnecessary technical questions, the bill should expressly apply to the Clayton Act, the Federal Trade Commission Act, the Webb-Pomerene Act, and the Wilson Tariff Act to the same extent as it applies to the Sherman Act.

3. Concept of "Excluding a Domestic Person." The key provision of Section 2 of the bill says that American antitrust laws will apply only to transactions that have a "direct and substantial effect" on U.S. trade or "has the effect of excluding a domestic person from trade or commerce with" a foreign nation.

While the phrase "direct and substantial" is unavoidably imprecise, it probably does as good a job as any in emphasizing that the concern of antitrust enforcement is principally upon effects in U.S. domestic markets. Moreover, the effects should not be indirect or remote -- as sometimes are adequate to trigger "interstate commerce" requirements in domestic enforcement.

I assume there is no debate that the antitrust laws should cover international cartel activity that affects U.S. markets -- for example, a world-wide division of markets between U.S. and foreign companies that operates to exclude foreign companies from the U.S. market -- and to be absolutely certain on this point, the legislative history probably should say so.

The phrase "excluding a domestic person" raises problems. Let me describe two rather different situations. First, if a group of U.S. companies through an illegal combination made it impossible for a domestic competitor to compete abroad (or to compete on fair and non-discriminatory terms abroad), that will usually diminish the company's

ability to compete in the U.S. The domestic company might still do some export business -- i.e., not be fully "excluded" -- yet not enough to support profitable operations. The word "exclude" has an absolute quality to it that may not be intended.

A different situation arises from the so-called "spill over" effects (i.e., the claims that cooperation abroad will lead to conspiracy at home) when companies cooperate to do business abroad. Some 30 years ago in the Minnesota Mining opinion, it was suggested that anti-competitive spill over effects are inevitable and that these might be enough to justify declaring illegal all collaboration in foreign markets.

It seems to me that the langugage we want would pick up the first situation if there is a direct and substantial effect on a U.S. businessman's ability to compete, even if there is something less than "exclusion", but pick up the second situation if there is proof of real anticompetitive effect. To accomplish that, it might be advisable to use the "direct and substantial"

language both to describe prohibited effects on domestic commerce and on domestic competitors. Section 2 could then be drafted to read as follows:

> "This Act shall not apply to conduct involving trade or commerce with any foreign nation unless such conduct has a direct and substantial anticompetitive effect on trade or commerce within the United States, or on a domestic person engaging in trade or commerce with a foreign nation."

If that formulation raises more problems than it solves, then some legislative history might be included to make clear that an anticompetitive effect can occur even if there is something less than complete "exclusion", but that the effect must be "direct and substantial".

With these minor changes and clarifications, I believe S. 795 will be a measured but useful response to an important problem.

Statement of Joel Davidow, Partner,
Mudge Rose Guthrie & Alexander

For seventeen years, from 1964 to 1981, I was involved in the government enforcement of the antitrust laws of the United States. In addition to two years in the Federal Trade Commission and one in a law firm serving as special counsel to states and consumers in the Middle West, I spent fourteen years in the Antitrust Division of the Department of Justice. From 1974 to 1978, I was chief of the Foreign Commerce Section, which is responsible for all international antitrust investigations and cases except those involving energy or transportation, and which handles most notification and consultation concerning matters of interest to foreign governments. From 1974 to 1981, I was Director of Policy and Planning. During most of the 1974-81 period, I served as a U.S. delegate to international committees and conferences on antitrust at the OECD and UN. These efforts led to OECD guidelines for multinational enterprises and to a set of United Nations principles and rules concerning the control of restrictive business practices. My other activities during the last decade include teaching international and comparative antitrust law at the Georgetown University Law Center.

In Congress, and especially in the judiciary committees, there has been revived in the last two years policy discussion of the extent to which our antitrust laws should apply to conduct that occurs abroad or has its effects abroad.

The Sherman Antitrust Act has since 1980 expressly prohibited agreements in restraint of either our interstate commerce or our commerce with foreign nations. However, by means of the Webb-Pomerence Act of 1918, Congress made clear that it would allow joint export activity that is registered with the Federal Trade Commission and that has no domestic effects.

Sporadically, there has been concern that our antitrust laws may be creating a variety of international disadvantages for America and its companies, and that the Webb-Pomerence exception may not provide an adequate incentive for export improvement. It has

been argued by some U.S. business groups that the antitrust laws are too uncertain, may be too hard on joint ventures abroad, and may allow foreigners to recover damages from U.S. firms in situations where there would be no recovery if the facts were reversed. Supporters of the antitrust laws have challenged the first two arguments as not proved by experience and the third as ignoring the benefits of deterrence.

The Webb-Pomerence Act has been criticized because only about 2 percent of U.S. exporters use it, in an era where, although U.S. exports are strong and rising, they have often not increased fast enough to overcome OPEC price increases and achieve a trade surplus. The scant use of Webb-Pomerence has been attributed by some persons to the slightly uncertain immunity it bestows, to its exclusion of services, and to the inability and unwillingness of its administering agency, the Federal Trade Commission, to encourage its use. Others have argued that regardless of the wording or administration of the Webb Act, most American firms simply prefer to compete abroad individually.

In light of these issues and others in this field, such as foreign displeasure with application of our antitrust laws to conduct by foreign nationals of their territory, some Senators have recommended a national commission to study international antitrust issues. Other members of Congress support immediate legislation to broaden the Webb-Pomerence Act and transfer its administration to the Department of Commerce. Still others would like U.S. law changed to prohibit foreign sovereigns from recovering damages from U.S. sellers, or to limit foreign sovereigns to single damages and condition that right on their having an antitrust law under which the U.S. has comparable rights.

The bill to which this testimony is specifically addressed, H.R. 2326, seems to be intended as an alternative to the other bills discussed above. Arguably, by altering the injury standard of the Sherman and Clayton Acts to emphasize their purposes to protect U.S. consumers and exporters, we can increase the certainty of immu-

nity for U.S. exporters and foreign joint venturers while at the same time making clear that foreign purchasers are not protected by our law. All this would be achieved with no increase in Federal bureaucracy or surveillance.

I can understand the temptations of this approach. Still, my enforcement experience, my year of negotiating common antitrust standards with foreigners, and my textual analysis of the bill impell me to conclude that such tampering with the basic language of the antitrust laws is unjustified, unwise and dangerous, and in any event riskier and less desirable than the alternatives now before the Congress.

As John Shenefield has ably testified before this Committee, there is no convincing proof that antitrust -- or any other law -- has significantly hampered U.S. exports; exports are high and growing. No joint venture of Americans to sell abroad has to my knowledge been challenged under the antitrust laws for thirty years. Only one U.S. firm has even sought an export-related business review clearance in the last three years. The Pfizer case will probably be settled without great damage to defendants. When or whether another such case might arise, and with what equities present, is highly problematical. We have not altered the wording of our basic antitrust law for 90 years. The Sherman Act served us well in maintaining free and open competition in both our domestic and foreign commerce. I perceive no present crisis that justifies tampering with or cutting back this statute.

Let me indicate now the relevance of my international experience, and of the work of many other U.S. delegates from the Justice Department, FTC and State Department. At the OECD, the major Free World economic organization, U.S. officials have regularly participated in the work of a Committee of Experts on Restrictive Business Practices. The Committee has studied many antitrust problems of common concern, and formulated recommendations intended to advance and harmonize free market principles.

In a 1974 report on export cartels, the Committee unanimously recommended that all OECD nations should require the

registration of all joint export groups. Such registration was seen as having two advantages: it enabled the home government to police whether there were domestic effects and it gave the buyers' government notice that a selling group was confronting them.

Changing the antitrust laws to make the Webb-Pomerence Act unnecessary could well create a situation in which neither our government nor foreign governments knew precisely which rival companies were coordinating their exports, export prices or foreign bids. That situation would be an inferior one to the present in terms of antitrust policy.

During the last five years, U.S. officials participated with delegates from eighty other nations in negotiating a Set of Principles and Rules for the Control of Restrictive Business Practices. This "antitrust code of conduct" was adopted unanimously by a U.N. conference and endorsed by the General Assembly. It morally commits all nations to pro-antitrust policies and to important related principles such as fair and equal treatment for all companies, whether private or state owned, and respect for the confidentiality of business secrets. Another agreed principle, particularly important to developing countries, is that nations should seek to eliminate all restrictive business practices within their competence that injure international trade, particularly the trade and development of developing countries. Certain recent U.S. antitrust cases and decisions, such as Government of India v. Pfizer, have been or may be helpful to developing countries. It would be anomalous for the U.S. to try to reduce the potential helpfulness of its antitrust laws to developing countries less than one year after agreeing to a U.N. antitrust code which points in just the opposite direction. Since that code contains many free market and fairness doctrines which our nation wants to see strengthened abroad, it would seem undesirable to create a climate of retreat from the code, especially when the need for doing so is very doubtful.

In the context of important but controversial cases such as that involving the international uranium cartel, a number of our

Western allies have complained about international application of our antitrust laws. American officials have defended our laws and enforcement policies not only by reference to international acceptance of the "effects doctrine" but also by contending that our antitrust enforcement is neutral, since it protects those foreigners involved in our commerce who are victims as well as penalizing those who are conspirators. Passage of any legislation overruling the Government of India decision would seriously weaken this argument. In this regard H.R. 2326 can be viewed as even more absolute than the Pfizer bill and thus as even more one-sided in its purpose.

I have so far stressed the lack of need for this type of legislation and the potential harm it would do to our foreign relations and our campaign to spread antitrust principles around the world. I turn now to the most important consideration, which is the potential effect of the bill on protection of legitimate American interests. Here too, the danger seems to outweigh the need and benefits.

First of all, the addition of the words "direct and substantial" to the Sherman Act could unduly limit circumstances in which injury to important U.S. interests could be remedied by our antitrust laws. The phrase might be interpreted to preclude challenge to incipient schemes that have not yet injured U.S. commerce. Thus, a forseeability standard is necessary. Second, it is unclear how the injury standards of the new act would apply to international shipping, international aviation, deepsea mining or other offshore activities. Third, the act would not allow recovery by an injured domestic person unless such person is "excluded" from foreign commerce. Present law compensates any significant degree of injury, even injury up far short of exclusion. Fourth, the term "domestic person" is unclear, but it could well mean that joint ventures or affiliates of U.S. firms selling or investing abroad would not be protected from any conduct by U.S. or foreign firms subject to U.S. jurisdiction. It is not clear that any subsidiary incorporated abroad, even if 100% owned by an American firm would qualify as a

"domestic person." Fifth, the Supreme Court ruled in the Concentrated Phosphate Case that the Webb-Pomerence exception does not protect conspiracies aimed at foreign purchasers who are using U.S. AID funds. H.R. 2326 would apparently inadvertently overrule this decision and fail to protect U.S. interests in such a situation.

It is significant to note that previous testimony by The Business Roundtable, the New York City Bar Association, James Atwood and John Shenefield, while supportive of certain objectives of H.R. 2326, has collectively mentioned nearly all the difficulties and objections I have just noted. Their recommendations in total would change nearly every significant word of H.R. 2326. Still, I do not believe that all their suggested changes taken together can cure all the defects and uncertainties of the proposed bill. Our courts have needed many years and many types of cases to develop rules in this difficult area. It has been widely believed that recent decisions in Timberline and Mannington Mills cases represent a good approach. This is no time to take the issue away from them and substitute a hastily written text containing both obvious and unforeseen infirmities.

I would summarize my advice to this committee as follows. There is no urgent need for legislation in regard to international application of U.S. antitrust laws at this time. Enforcement agencies, courts and international committees are all working to achieve balance and harmonization. If it is concluded that the problems are serious enough to warrant some action, then I believe that the most prudent course would be to enact S. 432, establishing an expert commission to examine, compare and draft alternative approaches to any jurisdictional or substantiative issues found to justify revision. If it is concluded that the Webb-Pomerence Act must be amended, I believe that S. 734, already passed by the Senate, is a preferable approach to H.R. 2326. The former bill would allow us and foreigners to know what international cartels are in existence and why. Also, S. 734 would provide more support for U.S. exporters being investigated under foreign antitrust law than would H.R. 2326,

because firms which have received specific government approval have a far better diplomatic argument for comity than do those who can rely merely on the fact that domestic antitrust laws do not apply at all to their foreign conduct. If it is concluded that the Government of India decision must be overruled, then S. 816 seems preferable to H.R. 2326, since it would be based on reciprocity and have the beneficial effect of encouraging countries to adopt antitrust principles similar to those of the United States.

The principles approximated in H.R. 2326 would usually make sense as enforcement or judicial policy, but it is unwise to try to freeze our concepts of commerce and injury within a new, untested formula that almost certainly will be too narrow to protect all our varied interests as an international trading nation.

STATEMENT OF THE PHOSPHATE ROCK EXPORT ASSOCIATION ON S.795, THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1981 AND RELATED LEGISLATION

PRESENTED TO

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

I. INTRODUCTION

My name is Howard W. Fogt, Jr. I am a member of the Washington, D.C. law firm of Foley, Lardner, Hollabaugh & Jacobs and am Secretary to the Phosphate Rock Export Association ("Phosrock"). I have been actively involved in Webb-Pomerene association practice for over ten years. I welcome this opportunity to testify on Phosrock's behalf regarding S.795 and related export trade legislation.

Phosrock commends the Committee for its attention to important export trade issues. Phosrock believes S.795 is a useful, first step in this direction. The goal of this legislation is to insure that the antitrust laws do not provide a remedy for foreign consumers or competitors that are involved solely in foreign commerical transactions, while at the same time preserving competition for interstate and import commerce. Phosrock endorses the substantive principles of this legislation. At the same time, S.795 should complement other export trade legislation designed to stimulate export trade through clarification of the antitrust laws.

Phosrock also supports S.734. In our view, S.795 is not a substitute for this important legislation. We believe S.734 has a significant, practical potential to resolve the legal uncertainties which have frustrated trade expansion efforts through a certification process which will state with detailed particularity export activity that is beyond the jurisdiction of U.S. antitrust law. Moreover, because S.734 requires registration and pre-clearance of export activity that would be immunized, the bill provides responsible governmental oversight of joint export trade activity that has traditionally been considered a necessary predicate to sanctioning such action by many significant exporting nations like Japan, Germany and the United Kingdom.

Three principal issues should concern this Committee. First, legislation must facilitate permissible joint action by U.S. exporters. Every effort must be made to eliminate unnecessary bureaucracy. In addition, as all who have studied this issue have recognized, uncertainty as to the legality of cooperative activity in the export market, coupled with hostility to the Webb-Pomerene Act by the Antitrust Division of the Department of Justice, has deterred greater utilization of the Webb-Pomerene Act. Nevertheless, uncertainties over the scope of the Act's exemption and concerns relating to legal complications in connection with an association's activities should not overshadow

the important cost savings, risk sharing and new market penetration that can be gained through a properly organized and operated export trade association.

Second, if Congress adopts a procedure to certify joint export activity, clear and definitive standards must be employed in processing applications, according automatic certification under appropriate circumstances. In passing the Webb-Pomerene Act in 1918, Congress was responding to the prevailing view that American firms required an antitrust exemption to permit them to compete effectively with foreign cartels and to sell to buying-entities that were owned, sponsored or supported by foreign sovereigns. The same condition exists today for many associations that compete against and deal with foreign governments. Once the Department makes its decision, it should not be second-guessed by other parts of the Executive branch.

Finally, any legislation should permit existing Webb-Pomerene associations to continue their operations without having to undergo an unsettling certification process. These associations presumably have conducted their operations in compliance with the substantive provisions of the Webb-Pomerene Act which are intended to remain unchanged in the new legislation. To require them nevertheless to justify their continued existence through a certification process would disrupt their

operations and jeopardize important customer relations thus hindering their efforts to compete against foreign rivals. Legislation designed to foster export trade ought not threaten the operations of organizations that have been promoting trade expansion for years.

II. PHOSPHATE ROCK EXPORT ASSOCIATION

Phosrock (or the "Association") was formed in 1970 when it registered with the FTC pursuant to Section 5 of the Webb-Pomerene Act. 1/ Phosrock is a Delaware nonstock corporation, and its Articles of Incorporation, By-Laws and form of Membership Agreement are on file at the Federal Trade Commission. The members of Phosrock are:

Agrico Chemical Company
AMAX Chemical Corporation
American Cyanamid Company
Freeport Phosphate Rock Company
International Minerals &
Chemical Corporation
Occidental Chemical Company
W. R. Grace & Co.

Membership in Phosrock is open to any person, firm or corporation engaged in the United States in mining phosphate rock. 2/

1/ 15 U.S.C. 65.

2/ Major phosphate rock miners in the United States include: Agrico Chemical Co.; AMAX Chemical Corporation; American Cyanamid Co.; Beker Industries; Estech (formerly Swift); Farmland Industries; Gardinier, USBP; W. R. Grace & Co.; Freeport Minerals Co.; International Minerals & Chemical Corp.; Kerr-McGee

(Footnote continued on following page.)

After an initial interim period of establishment of policies, location of offices and procurement of staff, Phosrock became a full-functioning association in 1972. Since its inception, Phosrock has endeavored to expand export trade and commerce in phosphate rock by assisting the phosphate rock export activities of its members. The utilization of Webb-Pomerene associations by United States sellers of mined products was one of the specific objectives in the enactment of the Webb-Pomerene Act. 3/ The FTC report which formed the basis of the Webb-Pomerene legislation summarized the Act's purposes and rationale when it stated that cooperation among domestic producers is imperative:

> To avoid needless expense in distribution, to meet formidable foreign buying organizations, to insure reasonable export prices

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(Footnote continued from preceding page.)

Chemical Corporation; Mobil Chemical Corporation; Monsanto Chemical Corporation; Occidental Chemical Co.; J.R. Simplot Co.; Stauffer Chemical Corp.; Texasgulf and U.S.S. Agrichemicals. Many other companies have substantial reserves. In addition, many smaller concerns have always been a factor in the market, particularly during periods of increased demand when entry seems attractive.

3/ Virtually every major industrial nation, and European Economic Community itself, encourages or permits the establishment and operation of export associations under exemptions from their respective antitrust laws similar to the Webb-Pomerene Act. The Treaty of Rome, which establishes Common Market competition policy, contains no explicit "foreign commerce" element like the Sherman Act but rather regulates only trade between member states. It has been specifically held not to apply to concerted action directed outside the Common Market. See Export Cartels (OECD 1974). Moreover, the Philippines and Brazil have each discussed the establishment, respectively, of coconut oil and coffee export sales cartels.

> and to prevent the profitless exhaustion of our national resources. . . . 4/

Phosrock is engaged in all aspects of export sales activity in phosphate rock as a non-exclusive agent of its members. Its responsibilities include market research and analysis, technical assistance, solicitation, negotiation and conclusion of export sales contracts, traffic coordination, invoicing, order processing and collection and distribution of the proceeds of sale. Phosrock has its headquarters in Tampa, Florida, and has representative offices in Paris, France; Sao Paulo, Brazil and Tokyo, Japan.

The Association is engaged solely in "export trade." The Certificate of Incorporation of the Association states that Phosrock:

> shall engage solely in export trade, as the term "export trade" is defined in the Act of Congress entitled "an Act to promote export trade, and for other purposes," approved April 10, 1918, commonly known as the "Webb-Pomerene Act," and any Acts amendatory thereof or supplementary thereto, and such export trade shall be solely trade and commerce in phosphate rock which is for export or is to be exported or is in the course of being exported from the United States to any foreign nation.

The Association makes no sales for United States domestic use or consumption and has no involvement in and takes no other action

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4/ 55 Cong. Rec. 3577 (Underscoring added.)

in United States domestic commerce. As such, Phosrock has nothing to do with the determination of the price of phosphate rock sold for consumption or use in the United States.

Moreover, Phosrock does not control the amount of phosphate rock available for export, for sale in this country, or even the amount to be exported by its Members. Under the Association's Membership Agreement, each Member, acting individually, determines the amount of phosphate rock which it wishes to sell each year through the Association (the Association serving as that member's agent). Each Member, in addition, retains the unfettered right to sell phosphate rock on terms and conditions which the Member individually determines, to any domestic person for whatever purpose, including exportation. 5/ Finally, Phosrock has no involvement in export sales by a Member company to any affiliated company abroad. 6/

Phosphate rock is a mined raw material used in various phosphorous derivative industries, particularly in the manufacture of complex phosphatic fertilizers. Generally speaking, it is a fungible commodity, the principal varient being the content or extent of the fertilizing element (P_2O_5). Various grades of phosphate rock contain differing concentrations of this element

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5/ In addition, subject to availability and mutual agreement on terms and conditions, Phosrock will sell and has sold phosphate rock to domestic persons for exportation.

6/ The term "affiliated company" is defined in Phosrock's Membership Agreement to be a corporation in which a member has a 20 percent ownership interest.

and, in the industry, have been differentiated by reference to the percentage of the content of P205 or the units of bone phosphate of lime or tricalcium phosphate (BPL). 7/ Known phosphate rock deposits are scattered throughout the world but are principally located in Morocco, Algeria, Tunisia, Spanish Sahara, Jordan, Israel, Togo, Senegal, South Africa, certain South Pacific islands, the Soviet Union and the United States. World phosphate resources (from all locations) total approximately 67,000 million metric tons. 8/

Major resource areas (million metric tons) are as follows:

Location	Reserves	Total Resources
Morocco	18,000	40,000
United States	2,200	8,000
South Africa	3,000	7,000
U.S.S.R.	1,400	3,400
Western Sahara	400	1,600
Australia		2,000

Of course, Morocco claims access to certain Spanish Sahara resources which only serve to increase its dominant position in the world market.

Virtually, all phosphate rock miners in the world, apart from those operating in the United States, are government owned or controlled. Countries in which phosphate rock miners

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7/ See, generally, Fertilizer Technology and Use (2d ed. 1971).

8/ "Phosphate" Mineral Commodity Profiles 3 (1979 ed. U.S. Dept. of Interior); see, generally, Phosphate Rock and Fertilizers In the World (OECD 1972).

are so controlled include Morocco, Algeria, Egypt, Senegal, Tunisia, Jordan, Israel, Syria, China, Vietnam, Australia, Ocean Islands, U.S.S.R., Brazil and Mexico. Naturally, phosphate rock miners in these countries all have the strong political and financial support of these governments. 9/ Morocco, for example, derives over one-third of its gross national product from the export sale of phosphate rock.

Further, many actual and potential customers of Phosrock are foreign governments or companies that are totally or substantially owned or controlled by their governments. Included in this category are customers in the following countries:

Australia	Bangladesh
Indonesia	Philippines
China	Taiwan
Portugal	Mexico
Romania	Austria
Czechoslovakia	Poland
Bulgaria	France (certain customers)
Venezuela	Italy
Pakistan	Brazil (certain customers)
India	Colombia
Sri Lanka	Costa Rica
Korea	Ecuador
El Salvador	Finland

The potential problems of dealing with these foreign sovereigns are many. For example, several years ago a South Asian government advised its American suppliers, who did not belong to a Webb-Pomerene association for that product, that it would not

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9/ See, Walters & Monseu, "State-owned Business Abroad: New Competitive Threat," Harvard Business Review, March-April 1979, p. 160.

honor any of the contracts the Country had executed with the American firms and would not accept any shipments of product until the suppliers released this customer from its contracts and lowered their price to a figure stipulated by the customer. The foreign government made it clear that failure to heed its request would result in a ban on further business. Because American firms thought they could not take collective action to prevent such pressure tactics, the foreign government was able to pit one supplier against the other until it managed to get one supplier to go along. Once the resistance of the American suppliers was broken, all the remaining American firms acted likewise in order to avoid losing substantial tonnage. However, millions of dollars of export revenue were lost as well.

Finally, even when an export customer is privately owned, it may, like in Japan, have a long-standing relationship of support and cooperation with its government. Moreover, the government may use its often considerable leverage to influence selection of a phosphate rock supplier in order to foster some other national interest. France, for example, has repeatedly urged the few remaining privately-owned French fertilizer companies to favor Morocco as a supplier in order to attempt to satisfy certain bilateral commitments between those two countries.

The statutory exemption for certain joint export trade activities which ultimately became the Webb-Pomerene Act was recommended by the Federal Trade Commission (the "FTC") to

permit United States companies to effectively compete with foreign cartels and to deal effectively with foreign customers owned, controlled or supported by foreign governments. A report by the FTC, based on an extensive two-year study, concluded that:

> In seeking business abroad, American producers must meet aggressive competition from powerful foreign combinations. . . . In various markets American manufacturers and producers must deal with highly effective combinations of foreign buyers. . . . These combinations naturally make individual American producers bid against each other. . . . If Americans are to enter markets of the world on more equal terms with their organized competitors and their organized customers, and if small American producers and manufacturers are to engage in export trade on profitable terms, they must be free to unite their efforts. 10/

The keystone of the Webb-Pomerene Act lay in its permitting a cooperative effort by American competitors in the pursuit of their common goal of winning foreign customers from foreign rivals. Congress recognized the advantages of united activity that could reduce the costs of exportation, increase the export market shares of American firms, and -- if the joint activity should result in higher returns from foreign sales -- foster the health of the American economy. Phosrock believes that its record of performance is fully consistent with the purposes and goals of the Webb-Pomerene Act.

10/ Federal Trade Commission, Report on Cooperation in American Export Trade (1916).

III. LEGISLATIVE ISSUES

Based on its view that properly organized and efficiently operated associations have made and can continue to make a positive contribution to expansion of American export trade, Phosrock strongly supports efforts like S.795 and 734 which are intended to promote export trade. On the other hand, we urge that Congress reject legislative proposals which, however well-intentioned, may have the practical effect of diminishing the utility of the Act under the guise of trade expansion.

Several issues relating to the Webb-Pomerene Act merit prompt legislative attention in connection with efforts to expand and promote export trade. Prominent among these issues are uncertainties relating to the statutory construction of the Act, the nature of enforcement activities under the Act and the potential disruption of activities of existing Webb-Pomerene associations as the result of any modifications of the Act.

A. Uncertain Statutory Construction

Since passage of the Act, there have been few decisions or proceedings construing its rather general provisions. 11/

11/ Judicial and administrative decisions considering application of the Act include: United States v. Concentrated Phosphate Export Association, 393 U.S. 199 (1968), rev'g 273 F. Supp. 263 (S.D.N.Y. 1967), on remand, 1979 Trade Cas. ¶72,719 (S.D.N.Y. 1969); United States v. United States Alkali Export Association, 325 U.S. 196 (1945), aff'g 58 F. Supp. 785 (S.D.N.Y. 1944), on remand, 86 F. Supp. 59 (S.D.N.Y. 1979); United States v. Anthracite Export Association, 1970 Trade Cas. ¶73,345 (N.D. Pa. 1970); United States v. California Rice Exporters, Cr. 32879

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These cases have treated a variety of issues including international cartel agreements, domestic price fixing, restraints on members' exports and use of foreign factories, effects on import trade, limitations on barters and exchanges and exclusion of services from the Act's immunity. Although these decisions help to define the scope of the limited immunity provided by the Act, the absence of clear and definitive statements of permissible joint conduct coupled with the continued hostility of the Department of Justice have had a negative effect on utilization of the

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(N.D.Cal.1952); United States v. Minnesota Mining & Manufacturing Corp., 92 F. Supp. 947 (D. Mass. 1950); United States v. Electrical Apparatus Export Association, 1946-47 Trade Cas. ¶ 57,546 (S.D.N.Y. 1947); Carbon Black Export, Inc., 46 F.T.C. 1245 (1949); General Milk Co., 44 F.T.C. 1355 (1947); Sulfur Export Corp., 43 F.T.C. 820 (1947); Export Screw Ass'n, 43 F.T.C. 980 (1947); Phosphate Export Ass'n, 42 F.T.C. 555 (1946); Florida Hard Rock Phosphate Export Ass'n, 42 F.T.C. 843 (1945); Pacific Forest Industries, 40 F.T.C. 843 (1940). See Larson, "An Economic Analysis of the Webb-Pomerene Act," 13 J.L. & Econ. 461 (1970); Simmons, "Webb-Pomerene Act and Antitrust Policy," 1963 Wis. L. Rev. 426 (1963); Note, "The Webb-Pomerene Act: Some New Developments in a Quiescent History," 37 Geo. Wash. L. Rev. 341 (1968); see also Brewster, Antitrust and American Business Abroad (1958); Fugate, Foreign Commerce and the Antitrust Laws (2d ed. 1973); Diamond, "The Webb-Pomerene Act and Export Trade Associations," 44 Colum. L. Rev. 805 (1944); Comment, "Export Combinations and the Antitrust Laws: The Dilemma of the Webb-Pomerene Act," 17 U. Chi. L. Rev. 654 (1950).

Act by American firms. 12/ The reluctance to risk legal problems has been recognized repeatedly as a major cause for the relatively small number of Webb-Pomerene associations. Former Assistant Secretary of Commerce Frank A. Weil recently testified:

> We think that the fundamental problem, one of the fundamental problems faced today in world trade relates to the fact that many American businesses -- rightly or wrongly -- perceive a threat from the U.S. government in the form of the Justice Department for their activities overseas in getting together to compete with the consortia that they find in competition abroad.
>
> And perhaps the simplest way to put it is that we in the Department of Commerce are not suggesting for one instant a relaxation of our commitment to firm principles of competion and antitrust law. On the other hand, we think that it is possible for the U.S. government to send a more positive signal in terms of those things which are permissible to the business community so as to encourage them to take permissible actions as they compete in the world. 13/

Former Secretary of Commerce John Conners said more than ten years earlier that "uncertainty about the exemption provided is a deterrent and companies are fearful that joining an association

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12/ The Department of Justice has repeatedly urged repeal of the Act. See, e.g., Shenefield, Antitrust and Trade Regulations Report (BNA) No. 875, AA-3 (August 3, 1978); Turner, International Aspects of Antitrust, Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 90th Cong., 1st Sess. 124 (1967).

13/ Weil, Hearing before the President's Commission on Reform of the Antitrust Laws and Procedures, July 27, 1978 at pp. 89-90.

may give rise to legal problems." 14/ The General Accounting Office and the Federal Trade Commission have reached the same conclusion. 15/ As the GAO said in 1973:

> it seems desirable to create a more favorable climate for increased exports while recognizing that care must be exercised to minimize their possible adverse impact in the domestic marketplace. . . . [W]e believe the critical U.S. export situation demands a positive approach -- encouraging the formation and operation of Webb-Pomerene associations -- so that the full potential of the Webb-Pomerene Act in promoting exports can be realized. . . . Because of uncertainty over possible antitrust implications, clarifying the provisions of the Webb-Pomerene Act would help create an environment in which U.S. firms might more readily join together. . . . 16/

14/ See McQuade, International Aspects of Antitrust, Hearings before the Subcommittee on Antitrust & Monopoly of the Senate Judiciary Committee, 90th Cong., 1st Sess. 179 (1967).

15/ General Accounting Office, "Clarifying Webb-Pomerene Act Needed to Help Increase U.S. Exports," Report to the Congress (1973); Kirkpatrick, Export Expansion Act of 1971 Hearing before the Subcommittee on Antitrust & Monopoly of the Senate Judiciary Committee, 92nd Cong., 2d Sess. 244 (1972).

16/ General Accounting Office Report, n.20 supra at 16-18. The continued existence of this uncertainty is demonstrated by comparison of the testimony given by the Antitrust Division and the Federal Trade Commission at the hearings on export trade legislation before this Subcommittee in 1979. A representative from the Antitrust Division said:

> The significance of the Webb Act obviously is closely related to the issue of the antitrust legality of joint exporting activities. Our position is one which we have held and disseminated for many years, and I want to emphasize it strongly. In general, American businesses do not require antitrust exemption or clearance to engage in

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These uncertainties must be resolved if export associations are going to realize the potential Congress intended when it passed the Webb-Pomerene Act in 1918. The Department of Justice is to be commended for its efforts to dispel the uncertainty

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> joint exporting ventures or any other joint activity the sole purpose of which is to sell goods or services for consumption abroad.
>
> A myriad of normal joint export activities can be and are constantly being carried on by groups of American companies without fear of antitrust prosecution. To be actionable, joint activity must have a substantial and foreseeable effect on United States domestic or foreign commerce. Joint activity intended to impact outside the territory of the U.S. and carried on so as not to affect competition between the parties in the United States is unlikely to raise any question under American antitrust law. Accordingly, it has been the consistent position of the Department of Justice that the antitrust exemption found in the Webb-Pomerene Act of 1918 is unnecessary to provide protection for export trade associations since the normal activities undertaken by such associations have as their exclusive focus markets abroad. (underscoring added)

On the other hand, a representative of the FTC testified:

> The Export Trade Act, also known as the Webb-Pomerene Act, was adopted in 1918 during a period of resurgent interest in foreign trade. The basic purpose of the Act is to increase exports by granting antitrust immunity to domestic competititors for joint activities in export trade that might otherwise be illegal. For example, the Webb-Pomerene Act allows firms that are competitors in domestic markets to jointly fix export prices and allocate foreign markets -- activities that could in some circumstances

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regarding the application of U.S. antitrust laws to international commerical transactions. Its 1977 Antitrust Guide for International Operations and the 1980 Antitrust Guide Concerning Research Joint Ventures provide excellent counselling tools for the international antitrust practitioner. In our view, these guides reflect a proper limitation on application of American antitrust laws to activities having a direct, foreseeable and substantial effect on U.S. domestic and import commerce. However, the limited construction which the Justice Department has described has not always been followed by a number of lower courts in contexts where only minimal effects on U.S. interests are present. 17/ S.795 and S.734 may make positive steps in resolving the uncertainty that has been created.

B. Enforcement Patterns

In our view, a significant reason for under utilization of the Act is the absence of a clear enforcement structure.

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> violate the antitrust laws in the absence of an exemption.

This conflict supports the continued need for an unambiguous exemption for joint exportation.

17/ Waldbaum v. Worldvision Enterprises, Inc., 1978-2 Trade Cas. ¶62,378 (S.D.N.Y. 1978); Industria Siciliana Asfalti Bitumi v. Exxon Research and Engineering Co., 1977-1 Trade Cas. ¶61,256 (S.D.N.Y. 1977); Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc., 375 F. Supp. 610, modified in part, 383 F. Supp. 586 E.D. Pa. 1974). But see National Bank of Canada v. Interbank Card Assn, 1980-81 Trade Cas. ¶63,836 (2d Cir. 1981) (anticompetitive effects within a foreign market are not sufficient to trigger Sherman Act jurisdiction).

Section 5 of the Webb-Pomerene Act provides a useful framework for such administration, but it has not operated for many years. Regulation should be centralized in the place that possesses the interest and expertise to ensure that the purposes of the Act are fulfilled. Provisions in S.734 which transfer administrative responsibility under the Act from the FTC to the Department of Commerce is responsive to this concern.

Second, uncertainty regarding permissible conduct will continue as long as the immunity conferred is stated in general terms. It is not enough to say that the Webb-Pomerene Act should be amended to eliminate exposure to treble damages and criminal litigation. Existing associations have that protection today -- but only for conduct in "export trade." An important and useful purpose would be served by stating with great specificity the kind of conduct that is beyond legal challenge. 18/ The legislative history to S.734 provides substantial assistance in this respect. However, to the extent that the legislation endeavors to achieve this certainty through administrative guidelines rather than in the legislation itself, considerable uncertainty may be generated. This uncertainty is heightened, moreover, by

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18/ See, e.g., United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950). Senator Danforth discussed this case in his January 19, 1981 floor statement on S.144 and said:

> The court held that an export association could not establish or operate jointly owned facilities abroad and then went on to give

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the provision in the bill that antitrust enforcement agencies traditionally hostile to the Webb-Pomerene Act may participate in the formulation of the guidelines and that the Department of Justice may second-guess any certificate that is granted. Accordingly, congressional attention should be focused on the specific export conduct permitted to be undertaken jointly and the role of the Department of Justice in the enforcement process. Indeed, the Senate Subcommittee on International Finance and Monetary Policy recognized in its Report on United States Export Trade Policy:

> Export activities are subject to uncoordinated and sometimes conflicting demands from different government agencies. In the face of competition from countries like Japan and Germany which achieve considerable coordination in these matters, the inability of the U.S. to promote cooperative export expansion efforts and synchronize export policies is a serious disadvantage.
>
> Legislative efforts to enable U.S. exporters to compete with foreign banks and cartels in overseas markets date back over sixty years. The Webb-Pomerene Act (1918)

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> illustrations of conduct that a Webb association may lawfully carry out: First, an association could be created by a majority of firms in an industry; second, the association could be used as the members' exclusive foreign outlet; third, members of the association could agree that goods would be purchased only from member producers; fourth, resale prices could be fixed for the association's foreign distributors; fifth, prices could be fixed and quotas established for members; and sixth, foreign distributors could be required to handle only the members' products.

> exempts the formation and operation of Export Trade Associations from some prohibitions of the Sherman and Clayton Acts, but its provisions have been singularly underutilized. Only 28 such Associations exist today, account for less than 3% of U.S. exports.
>
> The principal reason for the Act's failure is its vagueness. Because no definitive standards are prescribed for permissible activities. Webb associations have repeatedly been challenged by the Justice Department. Facing the likelihood of an antitrust investigation and with no clear idea of permissible activities and possible benefits under the Act, firms have been reluctant to form Export Trade Associations. 19/

C. Potential Disruption of Existing Activities of Webb-Pomerene Associations

During consideration of similar legislation in the 96th Congress by committees in both the House of Representatives and the Senate, concern was expressed repeatedly that any export trade legislation must contain a provision to assure that all existing Webb-Pomerene associations may continue their operations unimpeded. Existing associations have at stake many millions of dollars of capital investment and long-standing, proved methods of dealing. Additionally, existing associations frequently are parties to long-term contractual obligations that may be jeopardized if care is not taken to insure not only that there is no temporal discontinuity with regard to the antitrust immunity enjoyed by such associations but also that any modified system of

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19/ U.S. Export Trade Policy, A Report of the Subcommittee on International Finance of the Senate Committee on Banking, Housing and Urban Affairs, 96th Cong., 1st Sess. 18 (1979).

antitrust immunity be, at a minimum, co-extensive with the immunity currently available to Webb-Pomerene associations.

An effective approach to these concerns necessarily involves a number of elements. First, the protection of the substantial investment by existing Webb-Pomerene associations in export trade, their long-standing commercial relationships and long-term contractual obligations necessitates a provision in any revision of the Webb-Pomerene Act which permits Webb-Pomerene associations in existence as of the date of revision to continue to function under the current provisions of the Act. Second, these associations snuld be accorded the right to seek certification under Title II if they decide at sometime in the future that this process may be useful to them. S.734 provides such a meaningful grandfather protection in Section 207.

IV. CONCLUSION

In Phosrock's view, S.795 is an important useful first step toward export trade promotion but should not be viewed as a substitute for S.734 which passed the Senate by unanimous vote earlier this year. Phosrock recognizes that there are some who object to one or more features of each of these bills. We urge that prompt and thoughtful attention be given to possible resolution of these concerns so that a satisfactory compromise can be achieved. Such a compromise should contain the complementary features of S.734 and S.795. With respect to S.795, there are a number of technical amendments which are

appropriate. In that regard, Phosrock supports the testimony of Mr. Martin Connor given on behalf of the Business Roundtable before the House Judiciary Subcommittee on Monopolies and Commercial Law with respect to H.R. 2326. Regarding S.734, the major concern which has been advanced relates to the bureaucracy that may be created by the certification process which has been proposed. If this certification process is viewed as unnecessarily bureaucratic, a much more simplified procedure can and should be adopted.

Senator MATHIAS. Our third panel today consists of Mr. Victor, Mr. Joelson, and Mr. Angoff.

Gentlemen, as in the case of the previous panel, your written statements will be included fully in the record, as if read, and I will ask you to summarize them briefly.

STATEMENT OF A. PAUL VICTOR, ESQ., WEIL, GOTSHAL & MANGES, NEW YORK, N.Y.

Mr. VICTOR. Thank you very much, Mr. Chairman.

My name is A. Paul Victor. I am an attorney in New York, and I have been practicing in the antitrust and international trade areas for about 18 years now.

PERCEPTION OF ANTITRUST LAWS AS EXPORT DISINCENTIVE

It is often claimed, in support of exempting export activities from the antitrust laws that America's export position is deteriorating and that the antitrust laws are to blame. However, solid documentation or other proof to that effect is rarely, if ever, put forward.

Indeed, when one looks at the statistics, it seems as though American exports are really not doing too badly. In fact, last year total U.S. exports of good and services increased by $54 billion and exports of services were particularly strong, resulting in a surplus of $34 billion. The problem seems to be more the surge and soaring cost of oil imports rather than a lack of growth in exports.

Moreover, when one attempts to assess the role that antitrust laws have played in "deterring" export activity, it does not really appear to be significant. As Congressman McClory pointed out when he introduced H.R. 2326, the companion bill to S. 795, "a comprehensive study of export disincentives published last year by the Department of Commerce and the Office of the Special Trade Representative expressly did not include the antitrust laws among the major export trade disincentives, and no specific instances of those laws unduly restricting exports were shown."

Despite the absence of anything concrete to point to to support the thesis, there is, nevertheless, a growing perception in the American business community that our antitrust laws stand in the way of U.S. firms forming export trading companies, engaging in overseas joint ventures, and aggressively and efficiently marketing their products abroad. It is therefore possible that such a percep-

tion may be impeding optimal United States export performance and, to the extent the perception can be remedied by legislatively clarifying the antitrust laws without diluting the protection of consumers and competition within our own borders, it may well be appropriate for Congress to do so without any further delay.

LEGISLATIVE PROPOSALS TO REMEDY SITUATION

As you well know, there have been bills presented to accomplish the above objectives in the Senate. Last year, you introduced S. 1010, a bill to establish a blue ribbon commission to study the international application of the U.S. antitrust laws, including their effect on the ability of U.S. enterprises to compete effectively abroad. And this year, similar bills have been introduced by yourself here, and in the House by Congressman McClory. Regardless of what other related legislation may be enacted, I urge that there be quick action on the worthwhile endeavor reflected in S. 432.

Before the committee today, however, is a bill which would offer immediate relief to those U.S. exporters, including small and medium-sized firms, who are arguably inhibited from competing aggressively abroad by the uncertainty about the scope of the antitrust law's application. S. 795 would really not do terribly much new. It would essentially incorporate into the antitrust laws the enforcement policy that the Justice Department has been following for the past several years. But this would have the beneficial effect of removing the perceived uncertainty regarding the extra-territorial scope of our laws in private treble-damage actions, where the Justice Department is not a party, and it would also signal with some statutory specificity a positive antitrust attitude concerning joint conduct impacting on competition and competitors outside our borders.

Accordingly, I would urge the committee to approve S. 795 after taking into account a number of suggested word and other changes which I and other commentators have pointed out.

I recognize that there is a quite different legislative approach to improving U.S. exports reflected in S. 734, which has been passed overwhelmingly by the Senate and which is awaiting consideration in the House. I have very serious doubts, however, whether the best remedy for perceived antitrust constraints on joint export activity is to establish a new certification procedure in a nonantitrust agency—the Commerce Department—and to employ a new bureaucracy to implement it.

The certification procedure would take at least 3 to 6 months, and a substantial period of uncertainty would thereby exist that might itself discourage some firms from taking advantage of export opportunities. The certification procedure would also be complicated, expensive, and burdensome for exporting companies, and, in view of the provisions for comment by the public and other Government agencies, a drain on Government antitrust enforcement and trade promotion resources. Moreover, since the bill would place certification and guideline-writing authority in the Commerce Department, but enforcement authority in the Justice Department and the FTC, it would invite interagency conflicts. The resulting

delay and inconsistent Government policy, I think, might further inhibit aggressive export trading.

Indeed, S. 734 ironically might prove to be a deterrent to joint export activity by the small- and medium-sized companies the legislation is supposed to be designed to assist. As a form of economic regulation, it also appears to run counter to the administration's strong desire for deregulation.

I suggest, therefore, that S. 734 be held in abeyance, at least pending some sort of cost-benefit study to determine the efficacy of the contemplated certification procedure, and a study of the business community's experience under the antitrust laws as they would be clarified by S. 795. Indeed, if S. 795 is enacted before S. 432, such a study could be undertaken by the commission that would be created by S. 432.

SUGGESTED CHANGES TO S. 795

I would now like to spend just a few moments with respect to some of the suggested changes to the bill. First, I think the "direct and substantial effect" language should be revised to add the concept of foreseeability to put the effects test into line with the prevailing jurisdictional standards set forth in the *Alcoa* case. I also think there are a number of amendments which should be made that would conform the language of the bill to the existing language of the Sherman Act, such as using trade or commerce rather than trade and commerce and such as including foreign nation or nations rather than just foreign nation, and perhaps working in the idea of restraint rather than joint conduct. This would simply conform the amendment to the existing statutory language.

In addition, I think that some thought should be given to insuring that S. 795 does not inadvertently encourage the formation of foreign cartels injurious to U.S. consumers and commerce. For example, a statement could be included in the committee report accompanying the bill that it should not be construed to exempt from antitrust scrutiny U.S. firms' or foreign firms' participation in any market division agreement which, ostensibly covering only foreign markets, in fact has a direct, substantial, and foreseeable effect on commerce within the United States.

The other changes I suggest can be found in my written statement. Thank you very much for the opportunity to testify today.

Senator MATHIAS. Thank you.

Mr. Joelson we would be glad to hear from you next.

STATEMENT OF MARK R. JOELSON, ESQ., WALD, HARKRADER & ROSS, WASHINGTON, D.C.

Mr. JOELSON. Mr. Chairman, summarizing also, I believe that our antitrust laws remain vital to the country's economic well-being but that they will have to be reevaluated and perhaps reshaped if they are to be relevant and effective in today's international economy.

There are pressing issues that need attention, including those that are raised in S. 795. However, I do not think that S. 795 would be very significant in this regard.

My reasoning is twofold: First, insofar as exports are concerned, I think the legislation would provide some clarification but nonetheless would do little overall to boost U.S. exports; and, second, to the extent that the bill would deal with the other key issues raised by the application of U.S. antitrust law to international transactions, such as the direct and substantial effect test, the legislative proposal seems to me incomplete and premature.

I believe that launching new law on a fragmented basis in this area would be unwise, at least so long as there is the possibility of obtaining a coherent, comprehensive review, as is contemplated by S. 432 which would establish a commission to study the application of the U.S. antitrust laws to international transactions.

S. 795 seeks to relieve the antitrust concerns of American businessmen to the extent that their conduct affects foreign rather than domestic markets. The bill's drafting does need some further attention in this regard, and the drafting itself will require attention to some important issues which have been referred to by me in my written statement and by others this morning.

I have no objection in principle to the reduction or indeed the clarification of the asserted scope of our antitrust laws which would leave the matter of activities by American firms which affect foreign markets to the authorities of the appropriate foreign governments, but I doubt that this change in the law would provide a significant spur to U.S. exports or joint ventures abroad.

While the breadth of the U.S. antitrust laws or uncertainty about their scope may deter some transactions, it has not been established that this disincentive encompasses a potentially substantial volume of commerce from the national viewpoint.

We should keep in mind too that since, under the scheme of S. 795, antitrust exposure will remain for businessmen to the extent that other domestic firms may be affected by particular conduct, a significant degree of exposure and uncertainty will not be removed by this particular legislation.

My comments as to section 3 of the bill which would amend section 7 of the Clayton Act are similar. Section 7, in any event, has little relevance to exports because it requires a showing of anticompetitive effects in a section of the United States.

I now turn briefly to the other facet of the proposed legislation—the language which seeks to clarify the extent to which the Sherman Act applies to foreign commerce that does affect the U.S. market. Here, also, some drafting refinements are needed in the bill.

What the bill seeks to do is to articulate once and for all the appropriate test of subject matter jurisdiction, adopting for that purpose the direct and substantial effect language.

However, I do not think it is desirable at this time, prior to what hopefully will be a significant review of this entire area, to launch a new version or even a clarification of the rule in the *Alcoa* case.

As is well known, the *Alcoa* concepts of jurisdiction are internationally controversial and our courts have recently held in cases such as *Timberlane* and *Mannington Mills* that these concepts should be tempered.

It seems to me that, since the entire area warrants a fresh look and evaluation through the study envisaged by S. 432 or otherwise,

it should be looked at as a whole rather than after new pertinent law relating to the jurisdictional issue has been codified.

If a bill must be enacted now, I would think that S. 734 or some compromise version thereof would be the better approach. It seems to me that if there is a problem involving exports and the antitrust laws, it arises from a perception on the part of the business community that the antitrust laws are a threat to legitimate activity. The best way to remove that concern and that perception is to provide a Government certification process.

The suggested process itself raises many questions, including the creation of a new bureaucracy, but it seems to me that if certainty is the problem the only way to remedy that would be through the kind of certification process that S. 734 and versions thereof contemplate rather than a recodification of the law which would require construction by the courts and advice of private counsel.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Mr. Angoff?

STATEMENT OF JAY ANGOFF, ESQ., PUBLIC CITIZEN'S CONGRESS WATCH, WASHINGTON, D.C.

Mr. ANGOFF. Thank you, Mr. Chairman.

My name is Jay Angoff. I am a lawyer with Congress Watch.

I think that S. 795 is a definitive response to those who might be uncertain about the application of the antitrust laws to export activities.

Specifically, S. 795 is clearly superior to title II of the export trading company legislation, S. 734, which is important to note that the Senate Judiciary Committee did not get an opportunity to consider.

Both these bills are attempts to do the same thing—to exclude from the reach of the antitrust laws conduct which has effects only overseas but at the same time insure that effective antitrust enforcement will be maintained at home.

S. 795, to a large extent, succeeds because in only nine lines it explicitly amends the antitrust laws so that they apply only where domestic anticompetitive effects are present or a domestic competitor is injured.

S. 734, on the other hand, fails. It does not change the law, but it does set up a new bureaucracy and a new series of new bureaucratic procedures involving three different agencies, complicated application, immunization, certification, and revocation procedures, and various different waiting periods.

I have reproduced the new procedures that S. 734 would set up on pages 3 and 4 of my prepared statement.

Clearly, the burden that this process creates for firms is great, but for those firms that can afford to complete the process the rewards are even greater—that is, complete antitrust immunity for their export trade activities and methods of operation, even if those activities and operations do have an anticompetitive effect in the United States.

While S. 734 provides that Commerce can revoke its certification of immunity if the activities and operations of immunized firms spill over into and restrain trade in domestic commerce, it also

expressly bars private parties that are injured by the domestic effects of immunized firms' export activities or methods of operations from suing.

At the same time, the morass of redtape that S. 734 creates virtually assures that only the largest firms which do have the resources and sophistication both to see their way through the bureaucratic process and to export on their own will obtain antitrust immunity. The small- and medium-sized firms which the bills are intended to benefit might well be scared off.

As Congressman McClory has stated, "these procedures in themselves may prove to be as intimidating to the small exporter as any perceived lack of clarity in the law is today."

In short, if the choice is between S. 734 and S. 795, S. 795 is clearly preferable.

Nevertheless, S. 795, while clearly superior to S. 734, is itself unnecessary because the premise on which it is based—that is, that the antitrust laws or uncertainty about their application have hindered U.S. corporations in competing abroad with foreign firms—is false.

We have all heard this statement repeated, but we have rarely, if ever, been given specific examples of specific export activity that American corporations wanted to undertake but did not undertake because they were uncertain about whether such activity would violate the antitrust laws.

The reason we have not heard such examples is that the law is sufficiently clear. In general, U.S. firms can do whatever they want overseas as long as those practices do not have an anticompetitive effect in the United States.

The reason for this is not necessarily that Congress approved of American firms price fixing or dividing markets abroad but simply because the requisite effect on U.S. commerce to bring the activity under U.S. antitrust jurisdiction is lacking.

Moreover, even if the antitrust laws could be construed to apply to activity which did not have an effect in the United States, the Webb-Pomerene Act expressly permits U.S. firms to form export associations to market their goods abroad and the Justice Department has bent over backward to eliminate even the possibility of uncertainty by issuing its Antitrust Guide for International Operations in 1977, its Antitrust Guide Concerning Research Joint Ventures last year, and its new Business Review Procedure which it instituted in 1978 pursuant to which it would announce its enforcement intentions with respect to any proposed export project within 30 days.

In short, the Commerce Department appears to have been correct when it concluded in an exhaustive study of export disincentives in December 1980 that there were some American laws that were export disincentives but the antitrust laws were not among them.

In conclusion, Mr. Chairman, as between S. 795 and S. 734, S. 795 is better in every respect. It expressly provides that the antitrust laws will not apply to conduct the effects of which are felt only overseas, while particularly if tightened slightly in the manner Mr. Baxter, Mr. Pitofsky, and others have suggested, it makes sure that American small businesses, consumers, and State and local govern-

ments will still have a remedy under the antitrust laws when they are injured.

Moreover, S. 795 is an elegant, simple, and clean bill which creates no new bureaucracy.

On the other hand, the need for S. 795 has not been shown, and we therefore support, in lieu of S. 795, Senator Mathias' bill, S. 432, to establish a commission to determine whether a need for legislation such as S. 795 exists rather than assuming that that need does exist.

We would also urge the committee to consider whether S. 795 would undercut our credibility in urging other nations to adopt their own antitrust laws and adhere to free market principles, whether U.S. firms need to be able to form cartels to compete more effectively overseas, and whether circumstances have changed that would invalidate the observations of the National Commission for the Review of Antitrust Laws and Procedures which just 2 years ago recommended that Webb-Pomerene be eliminated or limited, not expanded.

We do not have answers to these questions, but we believe that they should be answered before our antitrust laws are tampered with, even by such clean and intelligently drafted legislation as S. 795.

Thank you very much.

The CHAIRMAN. Thank you.

Gentlemen, your testimony thus far has been thought provoking and certainly raises many good questions. Before asking you any specific questions, however, and recognizing the fact that there are different points of view among you, let me first ask if any of you would care to respond to any statements made by anyone else up to this point, including the testimony of the administration representatives.

Mr. JOELSON. I would just like to make one comment, and that is that the statement was made that the present system is working well. I would disagree with that.

I think, as this bill indicates, there are serious questions as to whether the present law is sufficiently responsive on U.S. export matters and, as is also well known, there is much controversy involving other nations who feel that our present system is not internationally responsive.

So I think we should do something to remedy the present situation vis-a-vis all aspects of it, and this is why I support, essentially, the study commission.

Mr. VICTOR. I would like to respond to a suggestion that was made earlier—that if something like S. 795 is enacted, it might be a signal to nations abroad that we are backtracking from the principles we believe in under the Sherman Act. I am really not so sure that that is the case since S. 795 essentially embodies what our Justice Department's policy already is in the area of international antitrust enforcement.

Mr. ANGOFF. Mr. Chairman, I would like to respond to the point that was made by Mr. Unger that S. 734 would give greater certainty to antitrust in export activities but would not hinder antitrust enforcement at home. I do not think that is true.

I think the big advantage which your bill, Mr. Chairman, has over S. 734 is that your bill gives certainty to antitrust activities abroad—that is, it explicitly says that antitrust does not apply when there are solely foreign effects but that it does apply when there are domestic effects.

What S. 734 would do is give firms immunity so that if there were spillover effects into domestic markets private parties would not be able to sue, and for that reason your bill, Mr. Chairman, is highly superior to S. 734.

The CHAIRMAN. The House Antitrust Subcommittee and this committee have received much input concerning suggested changes in S. 795. As briefly as possible, would each of you care to make any additional comments on any of the various proposals which have been mentioned, or do you feel what you have said is sufficient?

Mr. VICTOR. Mr. Chairman, I think you have before you the benefit of a lot of analysis—technical analysis of the proposed legislation—both with the testimony that was received over at the House and with the testimony that you have before you today.

I think almost everyone of us has given four or five, six, or seven suggestions, many of which are in tandem with each other, and I do not think it is necessary—for me, at least—to bring out any additional points at this time.

Mr. JOELSON. I would just mention two that have not been elaborated today.

First, what is the effect of the legislation if particular conduct injures not only foreigners in foreign markets but also injures Americans? In that situation, would there be an antitrust remedy as to the foreign markets, or only as to the domestic markets?

And beyond that, what about the effect of antitrust violations on American citizens abroad in foreign markets—American military people, for example?

These are not as important, perhaps, as the more general questions, but they do need attention in the drafting.

Mr. ANGOFF. I would just like to mention two things, Mr. Chairman.

First, as both Mr. Baxter and Mr. Pitofsky said, the total exclusion requirement in section 2 of the bill we would agree is too broad, and it would be better if it were replaced with a restraining or substantially restraining test.

Second, the great merit of S. 795 is that it is a short bill; it is a clean bill; anyone—big business, small business, or medium-sized business—can understand it; it sets up no bureaucratic procedure; and we would just hope that we do not amend this bill so that it would no longer be as clean, short, and easy to understand as it is now.

The CHAIRMAN. Mr. Victor, we have heard testimony this morning from Mr. Fogt about the need to insure the continued existence of Webb-Pomerene associations. You, on the other hand, have suggested that should S. 795 be enacted, the Webb-Pomerene Act could be safely repealed. Do you have anything else to say on that?

Mr. VICTOR. I just do not feel its retention is necessary. It has not proven itself very useful in the 60 years it has been around, and I doubt if it will prove itself very useful in the future.

But if it is important to some people to keep it around, and some people want some form of certification, then I do not have any inherent objection to keeping it as a part of a bill which would still be along the lines of S. 795. It may well be that, as a practical matter, some compromise could be worked out which would incorporate the essential thoughts of everybody who has been before you here.

The CHAIRMAN. Mr. Joelson, as evidenced by the hearing this morning, the Judiciary Committee is certainly concerned with helping small- and medium-sized businesses export their products and services. The committee would, of course, like to have a good understanding of how many of these businesses are standing by anxiously awaiting action by the Congress on such bills as S. 795.

Could you tell us what has been your experience during your practice of law as to the number and types of businesses interested in beginning an export program?

Mr. JOELSON. Mr. Chairman, I would say, generalizing, that many American businesses of all sizes are interested in exporting, but in most cases antitrust is not a major concern. Obviously, when they come to an antitrust lawyer, that is their major concern, but I don't think that this is a worry for most potential exporters.

It is my view that there are things that should be done to encourage American firms to export that have nothing to do with antitrust and whatever help we can give them in the antitrust area is essentially by way of reassurance and clearing up misconceptions. If that is what business wants in the form of S. 734 or something similar, there is something to be said for it, although I think the overall effect on exports will not be a very large one.

The CHAIRMAN. Have all of you made the comments you desire, or is there anything else from anyone? Do you have any further suggestions about this matter? If you do, now is the time to speak out.

[No response.]

The CHAIRMAN. Do you have any additional comments about possible changes the committee should consider here other than what you said? We would be glad to hear from you if you do.

If not, I think we have about finished the hearing.

Mr. JOELSON. I think that is all we have to say, Mr. Chairman.

The CHAIRMAN. Thank you very much. Without objection, your prepared statements will be inserted in the record. We wish to thank all of you for your appearance here today. The committee now stands adjourned.

[Whereupon, at 12 noon, the hearing was adjourned.]

[Prepared statements follow:]

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STATEMENT OF

A. PAUL VICTOR

PARTNER, WEIL, GOTSHAL & MANGES

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

CONCERNING

S. 795, the "FOREIGN TRADE ANTITRUST

IMPROVEMENTS ACT OF 1981," AND RELATED LEGISLATION

JUNE 17, 1981

Mr. Chairman and Members of the Committee, I am A. Paul Victor, a partner in the law firm of Weil, Gotshal & Manges. I have practiced antitrust and international trade law since 1963, first with the Antitrust Division of the Justice Department, then in private practice in Washington and, for the past 13 years, with my law firm in New York.

Not only as a practitioner of international antitrust law, but also as chairman of the International Trade Committee

of the American Bar Association's Section of Antitrust Law, I became interested in the issues raised by S. 795 and related proposals for promoting export trading. I appear today in an individual capacity, however, not as an ABA representative, and I thank you for the opportunity to offer my views on the legislation before you.

Need for Congressional Action

It is often claimed, in support of exempting export activities from the antitrust laws, that America's export position is deteriorating and that the antitrust laws are to blame. Solid documentation or other proof, however, rarely accompanies such assertions.

By contrast, when one looks at the statistics, it appears that American exports are doing quite well.*/ Thus, total United States exports of goods and services increased by $54 billion in 1980, helping produce a $7 billion trade surplus (up from approximately $5 billion in 1979). Exports of services were particularly strong, resulting in a surplus of $34 billion in 1980. Our continuing trade deficit in goods appears due far less to lagging exports than to the soaring cost of oil imports.

Moreover, when one attempts to assess the role that the antitrust laws have played in deterring export activity, it does not appear to be significant. As Congressman McClory pointed out in introducing H.R. 2326 (the companion bill to S. 795), a "comprehensive study of export disincentives published last year by the Department of Commerce and the Office of the Special Trade Representative expressly did not include the antitrust laws among the major export trade disincentives, and

*/ United States Dept. of Commerce, Bur. of Econ. Analysis, Survey of Current Business (March 1981).

no specific instances of those laws unduly restricting exports were shown."*/

Despite the absence of anything concrete to support the thesis, there is a growing perception in the American business community that our antitrust laws stand in the way of United States firms forming export trading companies, engaging in overseas joint ventures, and aggressively and efficiently marketing their products abroad. It is therefore possible that such a perception may be preventing optimal United States export performance. Accordingly, to the extent the perception can be remedied by legislatively clarifying the antitrust laws -- without diluting their protection of consumers and competition within our own borders -- it may well be appropriate for Congress to do so without any further delay.

I must note, however, that in the long run, mere clarifying amendments to the antitrust laws may not in fact boost the country's export position significantly. More likely, shifts in government economic and trade policy unrelated to antitrust will be necessary to achieve that goal. Therefore, to help determine more definitively what impact the antitrust laws have on United States exports and whether changes in those laws (or other laws and policies) are desirable, a comprehensive expert study of the subject would appear to be appropriate.

Alternative Legislative Approaches

Bills to accomplish the above objectives have been introduced in the Senate this session. Last year, the Senate passed unanimously a bill (S. 1010) establishing a blue-ribbon commission to study the international application of the

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*/ 127 Cong. Rec. H779 (daily ed. Mar. 4, 1981).

United States antitrust laws. This year similar bills have been introduced in the Senate by Senator Mathias (S. 432) and in the House by Congressman McClory (H.R. 2459). These bills would create a study commission consisting of members of Congress, executive branch officials, and representatives of the private sector. Endowed with staff and subpoena power, the Commission would be required to report its findings within a year. To expedite the launching of this valuable endeavor, regardless of what other related legislation may be enacted, I urge quick action on S. 432.

Before the Committee today, however, is a bill -- S. 795 -- which would offer immediate relief to those United States exporters (including small and medium-sized firms) arguably inhibited from competing aggressively abroad by uncertainty about the scope of the United States antitrust laws. S. 795 would merely incorporate into the antitrust laws the enforcement policy that the Justice Department has been following for the past several years. But this simple action would have the beneficial effect of removing the perceived uncertainty regarding the extraterritorial scope of the antitrust laws in private treble-damage suits, where the Justice Department is not a party. It would also signal with statutory specificity a positive antitrust attitude concerning joint conduct impacting on competition and competitors outside our borders. Accordingly, I urge the Committee to approve S. 795, after taking into account several minor word changes and other suggestions I will discuss in a moment.

First, though, I would like to express some concern about the quite different legislative approach to improving United States exports reflected in Title II of S. 734, the "Export Trading Company Act of 1981," passed by the Senate on

April 8, 1981, and the similar bill awaiting committee action in the House, H.R. 1648.

I recognize that Title II of those bills would make no major substantive change in existing antitrust law other than to extend to services the exemption now enjoyed by merchandise under the current Webb-Pomerene Act. Beyond that, those bills would alter existing law only procedurally by establishing a new regulatory mechanism for ostensibly ensuring greater certainty to organizations that take advantage of the exemption.

I have serious doubts, however, whether the remedy for antitrust constraints (real or perceived) on joint export activity is to establish a new regulatory system in a non-antitrust agency, the Commerce Department, and to employ a new bureaucracy to implement it. The certification procedure would take at least 3 to 6 months -- a substantial period of uncertainty in itself which might discourage some firms from taking advantage of those export opportunities that require prompt action. The certification procedure could prove complicated, expensive, and burdensome to exporting companies and, in view of the provisions for comment by the public and other government agencies, a drain on government antitrust enforcement and trade-promotion resources. Moreover, since the bills would place certifying and guideline-writing authority in the Commerce Department but enforcement authority in the Justice Department and the Federal Trade Commission, the bills would invite interagency conflicts. The resulting delay and inconsistent government policy could only further inhibit aggressive export trading.

In sum, Title II of S. 734 might ironically prove a deterrent to joint export activity by the small and medium-sized companies the legislation is designed to assist. As a form of

economic regulation, it also appears to run counter to the Administration's strong desire for deregulation. I urge, therefore, that Title II be held in abeyance -- at least pending the conducting of a cost/benefit study to determine the efficacy of the contemplated certification procedure and pending a study of the business community's experience under the antitrust laws, as clarified by S. 795. Such a study could be undertaken by the commission that would be created by S. 432, if the timing works out right.

In sum, I believe the clarifying changes in the antitrust laws provided by S. 795, together with the expedited procedure which the Justice Department has had available since late 1978 for supplying business-review letters regarding export activities (along with some statutory amendments enhancing the appeal of the business review procedure for those needing even greater certainty, if that is deemed desirable) should go far in meeting the commendable objective of providing greater antitrust certainty to those United States firms that seek to act in concert concerning exports.

I therefore urge Congress to enact S. 795 and to monitor closely the results of that bill's clarification of the antitrust laws' application to export trading. In addition, I believe Congress should enact S. 432, establishing a blue-ribbon study commission, and direct that commission to evaluate, among other things, the relative efficacy of S. 795 and the various proposals, such as Title II of S. 734, for an advance certification or business-review letter procedure, in the context of the law existing at that time.

Proposed Changes in S. 795

Based on my own analysis of the bill, as well as my review of the statements of other commentators at prior hear-

ings on the companion bill, H.R. 2326, I suggest that the following changes be made before the Committee approves S. 795.

With respect to the proposed new Section 7 of the Sherman Act, I suggest that:

1. The phrase "direct and substantial effect" should be revised to add the concept of "foreseeability." This would bring S. 795's effects test into line with the prevailing jurisdictional standard set forth in the Alcoa case*/ and the Justice Department's Antitrust Guide for International Operations. The phrase should read: "direct, and substantial, and foreseeable effect."

2. The phrase "trade and commerce within the United States" should be revised to read: "trade and or commerce within (including imports of goods or services into) the United States." Changing "and" to "or" would conform the phrase to its usual formulation in the Sherman Act. The proposed parenthetical phrase would make clear that restraints on imports into the United States would remain subject to scrutiny under the United States antitrust laws. It is essential that American consumers and businesses retain their present antitrust protection against such close-to-home restraints.

3. The words "conduct involving" should be changed to "any contract, combination in the form of trust or otherwise, or conspiracy in restraint of" and the second use of the word "conduct" should be changed to "restraint." In addition, "or nations" should be inserted after the words "foreign nation." These changes would simply conform the amendment to the existing language of the Sherman Act and eliminate potential confusion caused by different terminology.

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*/ United States v. Aluminum Co. of America, 148 F.2d 416, 444 (2d Cir. 1945).

4. The phrase "unless such conduct has a direct . . ." should be revised to read: "unless, and only to the extent that, such conduct has a direct . . . ."*/ This revision (together, perhaps, with appropriate explanatory language in the committee reports) would establish that if only one element of a firm's multi-faceted conduct affected trade or commerce within the United States, only that element would be vulnerable to antitrust review in this country. The proposed change would also limit a successful private antitrust litigant (including a foreign company or government) to those damages attributable to the proscribed action's effects on trade or commerce within the United States, rather than to its effects worldwide.

5. The concluding clause "or has the effect of excluding a domestic person from trade or commerce with such foreign nation" should be changed to ensure that "domestic person" includes all business entities operating in the United States, whether or not owned or controlled by United States-based entities. In addition, the "excluding" criterion might be too severe and might more appropriately be changed to "substantially restraining." Again, here, "or nations" should be added to "foreign nation."

6. Finally, some thought should be given to ensuring that S. 795 does not inadvertently encourage the formation of foreign cartels injurious to United States consumers and commerce. A statement could be included in the committee reports accompanying the bill that it should not be construed to exempt from antitrust scrutiny United States firms' (or foreign firms') participation in any market-division agreement

*/ This language was suggested by David N. Goldsweig, Esq., in his testimony on H.R. 2326 before the House Judiciary Committee's Subcommittee on Monopolies on March 26, 1981, at 10-11.

which, while ostensibly covering only foreign markets, in fact has a direct, substantial, and foreseeable effect on commerce within the United States.

With respect to S. 795's amendment to Section 7 of the Clayton Act, I would like to suggest the following:

1. The opening language, "This section shall not apply to joint ventures," should be revised to read "This section shall not apply to the formation of joint ventures." This change would preclude the unintended interpretation that Section 7 of the Clayton Act was no longer to apply to an acquisition or merger -- otherwise subject to its terms -- where one party to the transaction was a joint venture involved in export trading. The proposed revision would also make clear that the activities of export-trading joint ventures, as opposed to the creation of such joint ventures, would be subject to antitrust scrutiny to the same extent as other business entities' activities (namely, the extent defined in the proposed Section 7 of the Sherman Act).

2. The phrase "limited solely to export trading" might imply that joint ventures which purchase supplies or services in the United States for use in their export business or engage in other domestic activity incidental to that business would fall outside the proposed exemption. To avoid any such unintended construction, an appropriate explanation should be included in the committee reports accompanying S. 795.

3. Finally, "or nations" should be added at the end of the amendment.

The two provisions of S. 795, revised in the ways I have discussed, would read:

> "Sec. 7. This Act shall not apply to ~~conduct involving~~ any contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce with any foreign nation

or nations unless such ~~conduct~~ restraint has a direct, ~~and~~ substantial, and foreseeable effect on trade ~~and~~ or commerce within (including imports of goods or services into) the United States or has the effect of ~~excluding~~ substantially restraining a domestic person from trade or commerce with such foreign nation or nations."

"Sec. 3. Section 7 of the Clayton Act (15 U.S.C. 18) is amended by adding at the end thereof the following: "This section shall not apply to the formation of joint ventures limited solely to export trading, in goods or services, from the United States to a foreign nation or nations."

Aside from the above language changes, I recommend that both provisions of S. 795 (with appropriate conforming language) be added to all of the antitrust laws and the Federal Trade Commission Act. This would achieve consistency in the enforcement decisions of the Justice Department, the Federal Trade Commission, and the courts. This, in turn, would increase business certainty regarding the impact of the antitrust laws on export activities.

Finally, since the passage of S. 795 would render the Webb-Pomerene Act unnecessary, I recommend that Congress repeal it.

Thank you for the opportunity to testify today. I would be happy to respond to your questions.

PREPARED STATEMENT OF MARK R. JOELSON

Mr. Chairman and members of the Committee, I appreciate the opportunity to appear today, at the invitation of the Committee, to testify on the subject of S. 795, a bill designed to amend the Sherman and the Clayton Acts to exclude from their scope certain conduct involving exports. The introduction of this proposed legislation brings to the fore timely questions about the appropriateness of some facets of our antitrust laws in the context of today's international economy.

I am a partner in the Washington, D.C., law firm of Wald, Harkrader & Ross and co-author of a book called "An International Antitrust Primer," as well as of a number of law review articles on international antitrust issues. I am Chairman of the Committee on the International Aspects of Antitrust Law of the American Bar Association's Section of International Law, although I do not purport to be speaking here on behalf of the ABA or that Section. As a private practitioner, I am engaged in advising and representing a wide range of clients, including United States firms that export, U.S. trade associations, foreign companies, and foreign governments. 1/ The comments that I will offer today are my personal ones, reflecting this variety of experiences and espousing no particular client viewpoints.

I believe that our Nation's antitrust laws remain vital to our economic well-being, but that they must be

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1/ My firm and I are registered pursuant to the Foreign Agents Registration Act on behalf of the Government of Australia.

re-evaluated and, possibly reshaped, if we expect them to be viable and relevant in the '80s and beyond. As I testified before the Senate Committee on Governmental Affairs in 1979, in support of S. 1010 (the precursor of S. 432, proposing the establishment of a Commission to study the international application of the antitrust laws), the antitrust laws were designed by the Congress many years before we found ourselves immersed in the present dynamic and interdependent global economy. The courts, departments, and agencies have inevitably had difficulty applying legislation enacted in 1890 and 1914 to the international economic conditions of the 1970s and 1980s. The issues cannot, of course, be addressed simply in terms of antitrust enforcement, but often involve the need for a Solomon-like reconciliation of a wide array of national policy concerns, such as the need to promote competition, the need to promote exports, the property rights of private litigants, the legitimate interests of foreign sovereigns, and international relations.

S. 795 (and its identical measure in the House of Representatives, H.R. 2326) is one of several legislative initiatives which seeks to remedy, at least in part, this situation by providing fresh Congressional guidance and direction. However, my view is that the bill should not be enacted in this form at this time. My reasoning, which I will elaborate in a moment, is two-fold: (1) insofar as exports are concerned I think that the legislation would provide some helpful clarification but would do little overall to boost United States exports, and (2) to the extent that the bill would deal with the

other key issues raised by the application of U.S. antitrust law to international transactions, such as the "direct and substantial effect" test, the legislative proposal seems to me incomplete and premature. I believe that launching new law on a fragmented basis in this area would be unwise, at least so long as there is the possibility of obtaining a coherent and comprehensive review of the area through the Commission envisaged by S. 432.

(1) As Senator Thurmond pointed out when he introduced this proposed Foreign Trade Antitrust Improvements Act of 1981, the purpose of the legislation is to aid the efforts of American businessmen in competing throughout the world, by relieving their antitrust concerns to the extent that their conduct affects foreign, rather than domestic, markets. The bill apparently seeks to codify, for purposes of private treble damage lawsuits as well as government enforcement, the view expressed in the Department of Justice's Antitrust Guide for International Operations that the antitrust laws should not apply to foreign activities which have no direct or intended effect on United States consumers or export opportunities. 2/

I see no objection in principle to such a reduction (or clarification) of the asserted scope of our antitrust laws, which would leave the matter of activities by American

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2/ See the "Guide" (January 26, 1977), pp. 7, 21.

firms which affect foreign markets to the authorities of the appropriate foreign governments. Making express the non-applicability of the U.S. antitrust laws in this regard would eliminate some uncertainty and exposure for American business. It would also have its drawbacks, however. Precluding recovery where foreign markets are concerned would remove some of the deterrent effect of the antitrust laws for, as the Supreme Court observed in the Pfizer case, if "potential antitrust violators must take into account the full cost of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators." 3/ Should an antitrust remedy then be made available with respect to foreign markets where the same conduct had the proscribed domestic effects as well? 4/

3/ Pfizer Inc. v. India, 434 U.S. 308, 315 (1977).

4/ It is not clear to me from the wording of the bill what the effect of the amendment would be in this situation. Another ambiguity warranting attention is the use of the word "excluding" in Section 2 of S. 795, which suggests that American firms might be permitted to collusively impair the export opportunities of a domestic competitor, so long as they do not exclude him.

I would suggest also that any such legislation, to be complete in its treatment, would have to relate to other antitrust laws, including Section 5 of the Federal Trade Commission Act, as well as to the Sherman and Clayton Acts.

This approach has some logic, but it would make for cumbersome and complex litigation. And what, if anything, should be done to preserve an antitrust remedy for damages inflicted on U.S. citizens abroad, including military personnel?

In any event, I doubt that this change in the law would provide a significant spur to United States exports or to joint ventures by our businessmen abroad. While some bona fide export and joint venture transactions may be deterred by either the breadth of our antitrust laws or by uncertainty as to their breadth, it has not been established that this disincentive encompasses a potentially substantial volume of commerce from the national viewpoint. Under the present scheme, advice from counsel often significantly narrows the area of uncertainty and, while there is admittedly some reluctance to use them, the business review procedure of the Antitrust Division and the advisory opinion procedure of the Federal Trade Commission provide mechanisms for further restricting the area of uncertainty. The small role which the Webb-Pomerene Act has played in facilitating exports, by affording limited antitrust immunity for joint export activity, suggests that the proposed legislation would not provide an instant "shot in the arm" for U.S. exports.

We should keep in mind that arrangements between U.S. exporters, or even between a U.S. exporter and a foreign exporter, will not necessarily boost U.S. exports. Such arrangements may simply allocate the sales, a result which generally has little national value. It should also be remembered that, both under

the Webb-Pomerene Act and the scheme of S. 795, antitrust exposure is not lessened to the extent that domestic firms are affected by the joint conduct. Some export cooperation strategies necessarily affect other U.S. firms and some strategies may affect them in practice, so that there is a significant degree of exposure and uncertainty that will not be removed by this legislation.

My reflections as to Section 3 of the bill, dealing with the amendment to Section 7 of the Clayton Act, are similar. I have no objection to the proposal in principle, but it appears to provide little by way of either significantly changing the law [5/] or reducing uncertainty. So far as exports or joint ventures abroad are concerned, Section 7 is of less relevance than the Sherman Act, in part because it requires a showing of anticompetitive effects in a section of the United States. I do not know of a case brought under Section 7 alone against a joint venture insofar as it related to exporting or carrying on business in a foreign market.

If the antitrust laws indeed are a significant disincentive to United States exports or joint ventures abroad, this should be brought out in the study which S. 432 contemplates.

5/ Including "services", as well as "goods", within the scope of any clarifying or exempting legislation (including the Webb-Pomerene Act) would be appropriate, I think, but could be accomplished without the other changes here proposed.

We can then take the appropriate legislative action. I recognize that export cartels are a way of life in many parts of the world and that we should not leave our own exporters unaided and, instead, under the jeopardy of overly rigid American antitrust constraints. I do hope, however, that, in the long run, the matter of national export cartels will be dealt with on an international basis. International economic issues are best handled by international resolution.

(2) I now turn to the other facet of the proposed legislation, the language which seeks to clarify the extent to which the Sherman Act will apply to foreign commerce affecting the U.S. market: "conduct [having] a direct and substantial effect on trade or commerce within the United States..." While the language is not clear on the point, I assume that it is intended to embrace activity affecting imports into the United States, as well as certain transportation activities and other situations involving an impact on the U.S. market, and not just purely domestic commerce. However, it might not include other types of "nexus" situations. 6/

There is currently some confusion as to whether, with respect to international transactions, the basic test of subject matter jurisdiction under the Sherman Act is "substantial and foreseeable effect on U.S. commerce", "direct and substantial effect",

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6/ See, e.g., Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969).

or something else. All of these versions seek a suitable formulation to the Alcoa rule, [7] and there would be some advantage in settling on one articulated standard as S. 795 seeks to do with its "direct and substantial effect" language. However, I do not think that it is desirable at this time, prior to significant study of the matter, to launch a new version -- or even a clarification -- of the Alcoa rule. As is well known, [8] the Alcoa concepts of jurisdiction are internationally controversial, and our courts have recently held that these concepts should be tempered. The Ninth and Third Circuit Courts of Appeals have held that: "[a]n effect on United States commerce, although necessary to the exercise of jurisdiction under the antitrust laws, is alone not a sufficient basis on which to determine whether American authority should be asserted in a given case as a matter of international comity and fairness." Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 613 (9th Cir. 1976)(emphasis in original); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297 (3d Cir. 1979).

Senator Thurmond's statement accompanying the introduction of this bill indicated that the bill seeks only to provide the threshold test of jurisdiction, and that the factors enumerated in Timberlane and Mannington Mills would still be considered in deciding whether to apply the antitrust laws to

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[7] United States v. Aluminum Company of America, 148 F.2d 416 (2d Cir. 1945).

[8] See, e.g., PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS (J. Griffin, ed., 1979) (American Bar Association).

particular conduct. I appreciate the Senator's point, but it seems to me that, since the entire area warrants a fresh look and evaluation, it should be looked at as a whole, rather than after new pertinent law relating to the jurisdictional issue has been codified.

As I have said elsewhere, [9/] the Timberlane approach has much logic and appeal, but it is not clear that the district courts will be comfortable with a standard which is so complex and requires the balancing of sensitive intangibles such as international relations. Yet, some new approaches are needed.

In sum, Mr. Chairman and members of the Committee, I feel that S. 795 raises important issues which deserve study as part of a broader assessment of our national posture and planned direction with respect to international antitrust. I will be glad to answer any questions.

9/ Joelson, Challenges to United States Foreign Trade and Investment: Antitrust Law Perspectives, 14 Int'l Law. 103, 112 (1980).

STATEMENT OF JAY ANGOFF

STAFF ATTORNEY

PUBLIC CITIZEN'S CONGRESS WATCH

Mr. Chairman, Members of the Committee:

My name is Jay Angoff, and I am a staff attorney with Public Citizen's Congress Watch, a public interest advocacy group founded by Ralph Nader. Public Citizen is a nationwide consumer organization with approximately 70,000 contributors annually.

Mr. Chairman, S. 795, which you have introduced in the Senate, and H.R. 2326, its House counterpart, which has been introduced by both the Chairman and the ranking minority member of the Judiciary Committee and the Monopolies Subcommittee, are an intelligent, clean, simple and definitive response to those who might be uncertain about the application of the antitrust laws to export activities. S. 795 would explicitly limit the coverage of the Sherman Act to activity that has a "direct and substantial effect on" domestic U.S. commerce or that excludes a domestic competitor from foreign commerce. It would also amend the Clayton Act so that it would not apply to joint ventures limited solely to export trading; such joint ventures could be challenged only under the Sherman Act. Joint ventures that were not limited solely to export trading, of course, would continue to be judged under the Clayton Act. Essentially, the bill tells American business that it can do anything it wants that restrains commerce overseas, as long as it does nothing that restrains American commerce or injures an American competitor.

We do have two suggestions for tightening S. 795. First, requiring conduct, in order to be actionable under the Sherman Act, to have a "direct" effect on U.S. commerce does not really clarify the law--the direct/indirect distinction has never been a real one. But the "direct" requirement does give defendants an opportunity to delay by arguing that although their activity did restrain U.S. trade it did not directly restrain such trade. If "direct" were eliminated, and conduct to be actionable required simply to have a "substantial" domestic effect, defendants would not be given an added weapon for delay. At the same time, plaintiffs would not bring frivolous suits because of the substantiality requirement.

Second, under S. 795 if conduct did not have an effect on U.S. commerce but did injure, say, an American small businessman trying to compete in foreign trade or commerce, that American small businessman would have a remedy only if he were totally excluded from such trade or commerce. Clearly, however, he can be injured in foreign trade or commerce even if he is not totally excluded from it. We would therefore recommend changing "has the effect of excluding a domestic person from trade or commerce with such foreign nations" to "has the effect of restraining a domestic person" in such trade or commerce.

S. 795 v. S. 734

S. 795 is clearly superior to Title II of the export trading company legislation, S. 734, which, it is important to note, the Senate Judiciary Committee did not have an opportunity to consider. S. 795 and S. 734 are attempts to do the same thing: exclude from the reach of the antitrust laws conduct which has effects only overseas, but at the same time assure that effective antitrust enforcement will be maintained at home. S. 795 - particularly if the suggested changes we have recommended are incorporated - to a large extent succeeds; S.734 fails miserably.

On the one hand, S. 795, in only nine lines, explicitly amends the antitrust laws so that they apply only where domestic anticompetitive effects are present or a domestic competitor is injured.

On the other hand, S. 734 does not change the law but sets up a new bureaucracy and a series of new bureaucratic procedures, as outlined in the following provisions:

"SEC. 4. CERTIFICATION.

"(a) PROCEDURE FOR APPLICATION. Any association or export trading company seeking certification under this Act shall file with the Secretary a written application for certification setting forth the following:

"(1) The name of the association or export trading company.

"(2) The location of all of the offices or places of business of the association or export trading company in the United States and abroad.

"(3) The names and addresses of all the the officers, stockholders, and members of the association or export trading company.

"(4) A copy of the certificate or articles of incorporation and bylaws. If the association or export trading company is a corporation: or a copy of the articles, partnership, joint venture, or other agreement of contract under which the association or export trading company conducts or proposes to conduct its export trade activities, or contract of association, if the association or export trading company is unincorporated.

"(5) A description of the goods, wares, merchandise, or services which the association or export trading company or their members export or propose to export.

"(6) A description of the domestic and international conditions, circumstances, and factors which show that the association or export trading company and its activities will serve a specified need in promoting the export trade of the described goods, wares, merchandise, or services.

"(7) The export trade activities in which the association or export trading company intends to engage and the methods by which the association or export trading company conducts or propose to conduct export trade in the described goods, wares, merchandise, or services, including, but not limited to, any agreements to sell exclusively to or through the association or export trading company, any agreements with foreign persons who may act as joint selling agents any agreements to acquire a foreign selling agent any agreements for pooling tangible or intangible property or resources, or any territorial, price-maintenance, membership, or other restrictions to be imposed upon members of the association or export trading company.

"(8) The names of all countries where export trade in the described goods, wares, merchandise, or services is conducted or proposed to be conducted by or through the association or export trading company.

"(9) Any other information which the Secretary may request concerning the organization, operation, management, or finances of the association or export trading company; the relation of the association or export trading company to other associations, corporations, partnerships, and individuals; and competition or potential competition, and effects of the association or export trading company thereon. The Secretary may request such information as part of an initial application or as a necessary supplement thereto. The Secretary may not request information under this paragraph which is not reasonably available to the person making application or which is not necessary for certification of the prospective association or export trading company.

"(b) ISSUANCE OF CERTIFICATE.—

"(1) NINETY-DAY PERIOD.—The Secretary shall issue a certificate to an association or export trading company within ninety days after receiving the application for certification or necessary supplement thereto if the Secretary, after consultation with the Attorney General and Commission, determines that the association and its export trade, export trade activities and methods of operation, or export trading company, and its export trade, export trade activities and methods of operation meet the requirements of section 2 of this Act and will serve a specified need in promoting the export trade of the goods, wares, merchandise, or services described in the application for certification. The certificate shall specify the permissible export trade, export trade activities and methods of operation of the association or export trading company and shall include any terms and conditions the Secretary deems necessary to comply with the requirements of section 2 of this Act. The Secretary shall deliver to the Attorney General and the Commission a copy of any certificate that he proposes to issue. The Attorney General or Commission may, within fifteen days thereafter, give written notice to the Secretary of an intent to offer advice on the determination. The Attorney General or Commission may, after giving such written notice and within forty-five days of the time the Secretary has delivered a copy of a proposed certificate, formally advise the Secretary and the petitioning association or export trading company of disagreement with the Secretary's determination. The Secretary shall not issue any certificate prior to the expiration of such forty-five-day period unless he has (A) received no notice of intent to offer advice by the Attorney General or the Commission within fifteen days after

delivering a copy of a proposed certificate, or (B) received any noticed formal advice of disagreement or written comfirmation that no formal disagreement will be transmitted from the Attorney General and the Commission. After the forty-five-day period or, if no notice of intent to offer advice has been given, after the fifteen-day period, the Secretary shall either issue the proposed certificate, issue an amended certificate, or deny the application. Upon agreement of the applicant, the Secretary may delay taking action for not more than thirty additional days after the forty-five-day period. Before offering advice on a proposed certification, the Attorney General and Commission shall consult in an effort to avoid, wherever possible, having both agencies offer advice on any application.

"(4) APPEAL OF DETERMINATION.—If the Secretary determines not to issue a certificate to an association or export trading company which has submitted an application for certification, or for an amendment of a certificate, then he shall—

"(A) notify the association or export trading company of his determination and the reasons for his determination, and

"(B) upon request made by the association or export trading company, afford it an opportunity for reconsideration with respect to that determination.

"(c) MATERIAL CHANGES IN CIRCUMSTANCES; AMENDMENT OF CERTIFICATE.—Whenever there is a material change in the membership, export trade activities, or methods of operation, of an association or export trading company then it shall report such change to the Secretary and may apply to the Secretary for an amendment of its certificate. Any applicaiton for an amendment to a certificate shall set forth the requested amendment of the certificate and the reasons for the requested amendment. Any request for the amendment of a certificate shall be treated in the same manner as an original application for a certificate.

"(d) AMENDMENT OR REVOCATION OF CERTIFICATE BY SECRETARY.—

"(1) The Secretary on his own initiative shall, upon a determination that the export trade, export trade activities or methods of operation of an association or export trading company no longer comply with the requirements of section 2 of this Act, revoke its certificate or make such amendments as may be necessary to comply with the requirements of such section.

"(2) Prior to revoking or amending a certificate, the Secretary shall—

"(A) notify the holder of the certificate in writing of the facts or conduct which may warrant the action, and

"(B) provide the holder of the certificate an opportunity for such hearing as may be appropriate in the circumstances.

"(3) Before revoking or amending a certificate pursuant to this subsection the Secretary may in his direction provide the holder of the certificate an opportunity to achieve compliance within a reasonable period of time not to exceed ninety days, except that nothing in this paragraph shall affect any action under section 4(e) of this Act.

"(e) ACTION FOR REVOCATION OF CERTIFICATE BY ATTORNEY GENERAL OR COMMISSION.—

"(1) The Attorney General or the Commission may bring an action against an association or export trading company or its members to invalidate, in whole or in part, its certificate on the ground that the export trade, export trade activities or methods of operation of the association or export trading company fail or have failed to meet the requirements of section 2 of this Act. Except in the case of an action brought during the period before an antitrust exemption becomes effective, as provided for in section 2(c), the Attorney General or Commission shall notify any association or export trading company or member thereof, against whch it intends to bring an action for revocation, thirty days in advance, as to its intent to file an action under the subsection. The district court shall consider any issues presented in any such action de novo and if it finds that the requirements of section 2 are not met, it shall issue an order revoking the certificate or any other order necessary to effectuate the purposes of this Act and the requirements of section 2.

"(2) Any action brought under this subsection shall be considered an action described in section 1337 of title 28, United States Code. Pending any such action which was brought during the period any exemption is held in abeyance pursuant to section 2(c) of this Act, the court may make such temporary restraining order or prohibition as shall be deemed just in the premises.

"(3) No person other than the Attorney General or Commission shall have standing to bring an action against an association or export trading company or their respective members for failure of the association or export trading company or their respective export trade, export trade activities or methods of operation to meet the eligibility requirements of section 2 of this Act.

As best I can understand, these provisions mean that those seeking immunity would need to file a long and burdensome application with the Commerce Department; Commerce, after reviewing the application and checking with Justice and the FTC, would certify the applicant as immune from the antitrust laws if it found that it met certain criteria; Commerce could try to revoke an export association's antitrust immunity if it determined that it no longer met certain criteria; the export association could demand a hearing on the proposed revocation; and the Justice Department and the FTC could sue in federal court to try to have an association's antitrust immunity revoked if Commerce refused.

Clearly, the burden this process creates for firms is great, but for those firms that can afford to complete the process the rewards are even greater: complete antitrust immunity for their "export trade activities and methods of operation," even if those activities and operations have an anticompetitive effect in the United States. For while S. 734 provides that Commerce can revoke its certification of immunity if the activities and operations of immunized firms spill over into and restrain trade in domestic commerce, it also expressly bars private parties that are injured by the domestic effects of immunized firms' export activities or methods of operations from suing.

At the same time, the morass of red tape S. 734 creates virtually assures that only the largest firms, which have the resources and sophistication both to see their way through the bureaucratic process and to export on their own, will obtain antitrust immunity; the small and medium-sized firms S. 795 and S. 734 are intended to benefit might well be scared off. Thus, as Chairman Rodino has said, under S. 734 "the burden of an application process, the disclosure it may require, and the constant risk of Government intervention and regulation may impede, rather than stimulate, exports."[1] Or as Congressman McClory has put it, "such procedures in themselves may prove to be as intimidating to the small exporter as the perceived lack of clarity in the law is today."[2]

In short, if the choice is between S. 734 and S. 795, S. 795 is clearly preferable.

S. 795 v. No Legislation

Nevertheless, S. 795 - while clearly superior ro S. 734 - is unnecessary. For the premise on which the need for it is based--that the antitrust laws, or uncertainty about their application, have hindered U.S. corporations in competing abroad with foreign firms-- is false. While we have all heard general allegations about how antitrust uncertainty has hindered firms in competing abroad, we have rarely, if ever, been given examples of specific export activity that American corporations wanted to undertake, but did not, because they were uncertain about whether such activity would violate the antitrust laws.

The reason we have not heard such examples is that the law is sufficiently clear: U.S. firms are now and have always been free under the antitrust laws to fix prices, divide up markets and engage in any other practice that restricts competition overseas as long as those practices do not spill over into the U.S. or affect a U.S. competitor. The antitrust laws do not apply to such activity not because Congress approved of American companies fixing prices overseas, but simply because the requisite effect on U.S. commerce to bring the activity under U.S. antitrust jurisdiction is lacking. In order for conduct to be actionable under the antitrust laws, that conduct must have a substantial impact on U.S. commerce. [3]

Moreover, even if the antitrust laws could be construed to apply to activity which did not have an effect in the U.S., the Webb-Pomerene Act expressly permits U.S. firms to form export associations to market their goods abroad.

But just for good measure, the Justice Department has bent over backwards to put the minds of those who might still be uncertain about the reach of the antitrust laws at ease. In 1977, for example, it issued its "Antitrust Guide for International Operations," which gave detailed examples of how the antitrust laws are applied in international commerce. And last year it issued its "Antitrust Guide concerning Research Joint Ventures," for those who might be concerned about the application of the antitrust laws to such enterprises.

Perhaps most significant, in 1978 Justice instituted and widely publicized its new Business Review Procedure pursuant to which it would

announce its enforcement intentions with respect to any proposed export project within 30 days. As of January 1981, Justice had received exactly one request (on which it acted favorably).[4] This would lead one to believe that, if there was uncertainty about the reach of the antitrust laws at one time, it has been cleared up.

The truth seems to be that the antitrust laws, or uncertainty about their application, are not an impediment to exports or to foreign trade in any way. For example, in 1978 the Interagency Export Policy Task Force, after undertaking an exhaustive investigation of export disincentives, found no substantial evidence of lost business or of foreign projects which would have been undertaken absebt antitrust prohibitions. And a 1980 Commerce Department report on export disincentives expressly concluded that "no specific instances were shown of [the antitrust] laws unduly restricting exports."[5] If American export performance is disappointing, therefore, we should look elsewhere for its cause; we should not blame the antitrust laws.

Foreign Policy Implications of S. 795

For purposes of this discussion we have assumed that Congress would not object to restraints of trade by American firms the effects of which are felt overseas but not in the U.S. But this assumption may not be accurate. To be sure, it is difficult to get too upset about American firms fixing the price of their goods to Arab purchasers when they are themselves victimized by the price fixing of the OPEC cartel. However, the U.S. has always tried to hold itself--and has encouraged the world to try to hold itself--to a little higher standard than that adhered to by OPEC. Ever since the Reciporcal Trade Act of 1934, the U.S. has been committed to removing governmental restraints on trade and thus enhancing the freedom and fairness of the world trading system. After World War II, we encouraged the creation of antitrust laws in Germany and Japan, decartelized their industries, and prosecuted the major international cartels that remained.

We have continued to try to influence other nations toward pro-competitive, free-market principles, and our efforts have begun to bear fruit. Many, if not most, developed nations in the free world have laws prohibiting price-fixing and monopolization,[6] and the United Nations General

Assembly has adopted a set of Recommended Principles and Rules for the Control of Restrictive Business Practices.[7] This Committee may wish to consider whether passing legislation that expressly permits U.S. firms to fix prices and otherwise restrains trade overseas doesn't do more harm than good by undercutting our pro-competitive leadership--especially since the antitrust laws do not reach conduct the effects of which are felt solely overseas anyway. Arguably, all S. 795 does is "red flag" the fact that out antitrust laws are meant to protect and preserve U.S. commerce, and not necessarily foreign commerce. Or as House judiciary Committee Chairman Rodino has written,

> Evidence so far suggests that abrupt removal or reduction of antitrust authority in U.S. export markets could damage rather than enhance long-term U.S. trade prospects. Ill-considered action could provoke retaliation by our trading partners and increase the government's regulatory role. 8

Is There a Need for American Cartels

We have also assumed for purposes of this discussion that the existence of foreign cartels puts U.S. firms trying to compete with them at a competitive disadvantage. But "it is not clear," as the National Commission for the Review of the Antitrust Laws (NCRALP) emphasized just two years ago,

> why U.S. companies should be considered disadvantaged and in need of protection under such circumstances. Traditional cartel theory shows that firms operating outside of cartels often benefit from the high prices set by the cartel. A non-member American exporter would be free to charge a lower price and take business away from the cartel. This theoretical argument is further strengthened by the fact that seldom has a Webb association member cited protection from a foreign cartel as its reason for joining the association.[9]

Congress may also wish to consider whether the problems of some of our industries that are suffering the most from foreign competition--most notably autos and steel--spring from "inadequate enforcement rather than excessively stringent antitrust," as Northwestern University economist Fred Scherer recently told the Monopolies Subcommittee.[10] While the American auto industry for decades has been and has behaved as a three-firm ologopoly, the Japanese auto industry is made up of seven independent firms, none of which exports through a trading company or a cartel, and none of which is exempt from

the Japanese antitrust laws. As the Chief of the Antitrust Division's foreign commerce section has stated,

> it would be naive to suppose that a significantly enhanced cartelization of American export trade is a solution to the competitive challenges faced by American industry. Contrary to the argument that cartels promote economic efficiency, it seems at least as likely that they reduce it, and that those exporters who will be able to compete best abroad are those that cooperate least with their competitors.11

Or as Chairman Rodino has put it, "vigorous competition in the domestic market, a condition our antitrust laws are designed to protect, is a prescription for export success."[12]

Finally, this Committee may wish to consider the views of the National Commission on the existing Webb-Pomerene exemption. This Commission, which included among its distinguished members Senators Kennedy and Hatch and Congressmen Rodino and McClory, concluded that Webb-Pomerene should be narrowed or eliminated, not expanded. The Commission observed that

> The Act as drafted creates opportunities for significant anticompetitive spillover effects in domestic commerce. It creates an adverse environment for pro-competitive diplomatic initiatives. It would seem, moreover, that the pro-competitive purposes of Webb associations could be accomplished without antitrust immunity. In short, the methodological approach utilized by the Commission, when applied to the Webb-Pomerene Act immunity, would on the current record counsel its elimination.13

The Committee may wish to consider whether conditions have changed sufficiently in the past two years to cause one to question the validity of the National Commission's observations.

Conclusion

In conclusion, Mr. Chairman, as between S. 795 and Title II of S. 734, S. 795 is better in every respect. It expressly provides that the antitrust laws will not apply to conduct the effects of which are felt only overseas, while--particularly if tightened slightly in the manner we have suggested--making sure that American small businesses, consumers, and state and local governments will still have a remedy under the antitrust laws when they are injured. Moreover, S. 795 is an elegant, simple and clean bill, which creates no new bureaucracy.

On the other hand, the need for S. 795 has not been shown; and we

would therefore support in lieu of S. 795 Senator Matthias's bill to establish a commission to determine whether a need for such legislation does in fact exist.

We would also urge the Committee to consider whether S. 795 would undercut our credibility in urging other nations to adopt their own antitrust laws and adhere to free trade principles; whether U.S. firms need to be able to form cartels to compete more effectively overseas; and whether circumstances have changed that would invalidate the observations of the National Commission in 1979.

We do not have answers to these questions, but we believe that they should be answered before our antitrust laws--the "Magna Carta of our free enterprise system"--are tampered with, even by such clean and intelligently drafted legislation as S. 795.

FOOTNOTES

1. 127 Cong. Rec. H779 (March 4, 1981).

2. Id.

3. See Steele v. Bulova Watch Co., 344 U.S. 280 (1952); United States v. Aluminum Company of America, 148 F.2d 416, 444 (2d Cir. 1945), Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690, 704-05 (1962).

4. C. Stark, Antitrust and U.S. Export Competitiveness, at 5 (Jan. 21, 1981).

5. Id., at 3-4. If there are those who still claim-despite the apparent evidence to the contrary-that the antitrust laws are an impediment to export activities or foreign trade then perhaps a commission should be established to settle the matter once and for all. S. 432 and H.R. 2459 introduced by Senator Mathias and Congressman McClory, would establish such a Commission. If the Commission found that antitrust uncertainty really was an impediment to export trade, then perhaps legislation like S. 795 would be necessary. But if it found otherwise, then legislation would not be needed.

6. See, e.g., Organization for Economic Cooperation and Development, Guide to Legislation on Restrictive Business Practice (OECD, Paris 1979).

7. See C. Stark, supra note 4, at 1.

8. P. Rodino, "Domestic Antitrust Protection Needn't Be Sacrificed to Assist Exporters," L.A. Times, April 5, 1981, at VI:3.

9. See Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures, Jan. 22, 1979, 897 BNA Antitrust and Trade Reg. Rep., Spec. Supp. (Jan 18, 1979).

10. Statement of F.M. Scherer, before the Subcommittee on Monopolies and Commercial Law, House Judiciary Committee, April 30, 1981.

11. C. Stark, supra note 4, at 10.

12. P. Rodino, supra note 8.

13. Report to the President, supra note 9, at 302.

APPENDIX

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June 17, 1981

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
2226 Dirksen Senate Office
Building
Washington, DC 20510

Re: S.795 and Related Export Trade Legislation

Dear Chairman Thurmond:

During the course of testimony by Joel Davidow at the June 17, 1981 hearing on S.795, he made reference to a Common Market investigation of my client, the Phosphate Rock Export Association. Since, in my view, the record on that matter was left unclear, I would appreciate this letter being included in the record so that any questions concerning this matter can be resolved.

On July 12, 1976, the Commission of the European Communities instituted an investigation to determine whether Phosrock had infringed Articles 85 and 86 of the Treaty of Rome. In the course of that investigation, the Association supplied certain information which had been requested by the Commission. In August, 1976, the Commission formally requested that consultations be held on this matter between the Government of the United States and the Commission of the European Communities. Those consultations were held during the fall of 1976. In March, 1977, the Commission requested further information about Phosrock which was voluntarily supplied. No further proceedings in this investigation have occurred, and we understand that several years ago it was closed.

I hope this information will be of assistance to the Committee in developing a complete record in this matter.

Sincerely yours,

Howard W. Fogt, Jr.

Howard W. Fogt, Jr.

STATEMENT OF

THE BUSINESS ROUNDTABLE

On S. 795

The Business Roundtable is pleased to submit its views on S. 795, a bill to clarify the reach of the antitrust laws as they affect the foreign commerce of the United States. The Business Roundtable is an association of nearly 200 chief executive officers of major American companies. The Roundtable's purpose is to examine public issues that affect the economy and to develop and present positions that reflect sound economic and social principles. Since most of the companies represented by Roundtable members have substantial international business activities, S. 795 addresses an area of major interest.

ROUNDTABLE SUPPORT FOR GOALS OF S. 795

The Business Roundtable is pleased to report that it strongly supports the goals of this legislation. These goals, as we understand them, are to define and clarify the territorial scope of U.S. antitrust laws. The sponsors of this legislation have correctly observed that the international reach of these laws is uncertain, that this uncertainty has diminished export activity by American firms, and that the antitrust laws governing international transactions need to be clarified. We agree with these premises, and our members have confirmed them in their own business experience.

The bill's sponsors have also expressed their intention to limit the reach of antitrust liability to situations involving direct and substantial effects on our domestic consumers and businesses, to remove joint ventures engaged in export trading from the scope of Section 7 of the Clayton Act, and to reduce the potential for antitrust suits by foreign entities, including foreign governments. The Roundtable applauds all of these objectives. We suggest that

they can be fulfilled by passage of this bill, with the amendments that we propose.

REASONS FOR LIMITING APPLICABILITY OF U.S. ANTITRUST LAWS

In defining the proper scope of this country's antitrust laws, we think that it is important to remember that our antitrust laws are unique in that, in most parts of the world, conduct that we prohibit at home is encouraged or accepted.

For example, U.S. law condemns trade restraints except in regulated industries. In contrast, many socialist nations, even those in the free world, openly restrain or prohibit competition, and others regulate far larger segments of their economies than we do. Even among countries with free economies, regulatory intervention is more pervasive, and administrative approval may be obtained to engage in otherwise anti-competitive conduct.

When foreign antitrust restrictions exist, they are far less stringent than in the United States. Substantial horizontal acquisitions are often approved in "the public interest," and vertical or conglomerate mergers are virtually unmolested. Practices such as resale price maintenance, restrictive patent licensing, and price discrimination are commonplace.

Similarly, foreign devotion to antitrust enforcement is less intense than in the United States. The amount of foreign antitrust litigation is trivial in comparison with the 1000 to 1500 antitrust cases filed in U.S. courts in each of the last ten years. No other nation of the world imposes the punitive sanction of treble damages on antitrust defendants. The combination of sanctions available in the United States, including criminal felony liability, parens patriae recoveries, class actions, and recovery of

attorneys' fees is also unparalleled. In most nations with laws that resemble our antitrust laws, relief for private injury is unavailable, and criminal sanctions do not exist.

Not only do other trading nations of the world play by different rules, but they also have displayed growing hostility toward the extra-territorial reach of our antitrust laws. Many nations have laws on their books that prohibit cooperation with U.S. antitrust authorities, interfere with U.S. antitrust prosecutions and defenses, and negate the operation of our laws in their territories.

These gross disparities in economic systems raise fundamental questions of economic policy. Accepting the fact that our antitrust laws reflect a considered judgment about how businesses in the United States should treat American consumers and competitors, there is no imperative that justifies any longer -- if it ever did -- federal legislation declaring how our businesses should deal with overseas consumers or foreign competitors. Therefore, the Roundtable agrees with the premise of S. 795 that there is no reason why our law should reach out to protect consumers in other nations whose governments have not chosen to protect their own nationals with competition statutes. In a pluralistic world, nations should be free to define their own domestic economic interests.

In this context, it is not only naive but futile to assume that U.S. antitrust laws can or will inject competition into foreign markets. The only way that this will occur is if foreign nations themselves adopt and apply antitrust laws to all those who enter their markets. The unilateral imposition of antitrust restraints on U.S. businesses engaged in foreign commerce simply disables U.S. firms from competing on an equal footing with their foreign counterparts.

Respect for these differences in legal and economic systems requires not only that our laws be well-defined, but also that they not be overly expansive in their reach. The Roundtable is committed to the proposition that our antitrust laws play a basic role in protecting the American free-enterprise system by helping to insure that consumers and businesses in this country receive the benefits of competition. Conversely, however, we see no reason why our laws should reach out to regulate transactions whose primary effects occur outside of our territory.

NEED FOR CLARIFICATION OF EXTRATERRITORIAL APPLICATION

The Roundtable shares the view of the sponsors of S. 795 and its House counterpart, H.R. 2326, that there is considerable uncertainty about the actual reach of our antitrust laws in foreign commerce. This uncertainty adversely affects the ability of American businesses to enter into international transactions that would be highly beneficial and to compete effectively with foreign companies for a share of world markets. These problems warrant clear congressional definition of the proper range and focus of our antitrust laws.

It is interesting that, although Assistant Attorney General Baxter's recent statement before this Committee supported the propriety of legislative clarification in this field, he suggested that the business community's concerns may be "largely unfounded."[1/] We believe, though, that Attorney General Smith was closer to the mark when he recently called for a "broad reassessment of our antitrust enforcement practices concerning international commerce." The Attorney General recognized:

> "In many instances, the government's pursuit of too narrow a view of competition has actually impeded American firms' efforts to compete internationally."[2/]

Proponents of the status quo sometimes assert that the case for legislative action has not been made because businesses have not stepped forward with an accounting of specific business opportunities that were aborted for antitrust reasons. It is not surprising, though, that businessmen have not often volunteered to recount examples of the restraining effects of antitrust law on their international activities.

For example, antitrust considerations typically enter the picture long before a business transaction is explored in depth. If these considerations indicate problems, the possible transaction may die on the drawing board well before negotiations are commenced. In these circumstances one cannot clearly ascribe to antitrust a lost opportunity that was never developed to the point of possible consummation. In many cases, antitrust concerns may even preclude preliminary discussions to explore a transaction. Equally important is the natural reluctance of firms to admit that potential antitrust violations ever even crossed their minds.

Nevertheless, it is not difficult to pinpoint the general classes of international business transactions that are restricted by the threat of antitrust problems, but from which that threat should be eliminated. These would include joint ventures or other arrangements among exporters that may involve the allocation of territorial responsibilities or the establishment of common prices or other terms of trade, technology licenses that restrict sales by the contracting parties to particular countries or regions, and offshore acquisitions that permit U.S. firms to enter foreign markets.

Judicial decisions are rife with inconsistencies regarding the types of effects on the domestic economy that must be demonstrated in order to establish U.S. antitrust jurisdiction over an international transaction. For example,

courts have variously stated that U.S. antitrust laws apply if the conduct "affects" U.S. commerce,[3] or if the conduct "directly and substantially" affects U.S. commerce,[4] or if the conduct occurs with "the intent to affect" U.S. commerce,[5] or if the conduct has a "direct and influencing effect" on U.S. commerce.[6]

The commentators are also divided on the correct test to apply in determining whether there is, properly, U.S. antitrust jurisdiction over international business transactions. One authority asserts that the requisite effects must be direct or substantial,[7] while another declares even more sweepingly that liability may arise if either the conduct occurs in the course of U.S. foreign commerce or substantially affects either foreign or domestic commerce.[8] As the Court of Appeals for the 9th Circuit pointedly observed in Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 610 (9th Cir. 1977):

> "American courts have firmly concluded that there is some extra territorial jurisdiction under the Sherman Act. Even among American courts and commentators, there is no consensus on how far the jurisdiction should extend." (Emphasis added.)

The Business Roundtable submits that no legitimate purpose is served by perpetuating uncertainty on this fundamental question.

The Roundtable does not wish to create the impression that the risks and uncertainties of antitrust are the most important barrier to the ability of U.S. firms to seize overseas business opportunities. There are, of course, hosts of business uncertainties confronting a firm that is considering its foreign trade potential. Antitrust is only one of these barriers. But it is an obstacle that Congress has the power to wipe away with clarifying legislation. This unnecessary barrier to American participation in world trade can be

removed while leaving intact the protection that the antitrust laws afford to American businesses and consumers.

OBJECTIVES OF LEGISLATIVE CLARIFICATION

In the Roundtable's view, legislative reform of existing law should achieve three essential purposes:

> First, any reform should specify that international transactions are not subject to U.S. antitrust jurisdiction except to the extent that the conduct has direct, substantial, and foreseeable anti-competitive effects in the United States by restraining trade in domestic commerce.
>
> Second, legislative reform should eliminate liability to foreign purchasers of products or services that are sold for export, leaving those purchasers to assert whatever legal rights their own governments have seen fit to create for conduct whose effects are felt within their territory.
>
> Third, legislation should eliminate other sources of liability, including government enforcement actions either by the Justice Department or the Federal Trade Commission, for injuries to foreign purchasers of U.S. exports.

These objectives, we believe, are consistent with the stated goals of the bill's sponsors. They are also consistent with the better view of legal authorities.

The requirements of "directness," "substantiality" and "foreseeability" as essential predicates for U.S. antitrust jurisdiction are presently embodied in the Justice Department's

summary of controlling legal principles for evaluating international transactions.[9/] Legislation like S. 795 would refine and codify these fundamental principles and tests, and would thus establish a stable set of statutory principles on which businessmen and their counsel can rely.

As we understand it, S. 795 is designed to establish minimum jurisdictional prerequisites. Although reform and clarification of the "domestic effects test" is crucial, it should be remembered that additional factors are and will continue to be considered in determining the propriety of actually asserting jurisdiction over international transactions and in assessing their lawfulness. For example, in making these determinations, the federal courts would continue to consider the defendant's nationality, the relative interests of the United States and other nations that are affected by the transaction, the location of the conduct, and similar factors.[10/]

In short, "direct, substantial, and foreseeable" effects on domestic commerce should be essential -- but, in a particular case, may be insufficient in light of the interests of international comity and of congressional intent -- to warrant application of the U.S. antitrust laws.

PROPOSED AMENDMENTS TO S. 795

Although the Business Roundtable strongly supports the announced objectives of S. 795, we recommend that the language of the bill be changed in certain respects for the purpose of further clarifying its impact. The text of these proposed amendments is attached to this statement.

First, we urge that the scope of the bill be broadened to cover all of applicable antitrust laws, rather than simply the Sherman Act. While the Sherman Act is probably the most important of these laws in the interna-

tional arena, remedial legislation should also cover the Clayton Act -- including the pricing strictures of the Robinson-Patman Act -- and the Federal Trade Commission Act. The bill's "domestic effects test" should be equally applicable to pricing practices and distribution agreements, which are dealt with under Sections 2 and 3 of the Clayton Act (Section 2 is the Robinson-Patman Act), and to the broad range of antitrust-type conduct covered by Section 5 of the Federal Trade Commission Act. To achieve this important change, we recommend that, in the proposed new Section 7 of the Sherman Act, the Committee substitute the language "Nothing in this Act, the Clayton Act, or Section 5 of the Federal Trade Commission Act shall apply. . . ." for the current language of the bill: "This Act" -- meaning only the Sherman Act -- "shall not apply. . . ."

Second, we urge that the phrase "regardless of whether such conduct occurs within or outside of the United States" be inserted in the second line on page 2 of the bill after the word "nation." This language would assure that the "effects test" is a two-way street that is applied regardless of where the alleged conduct occurs. The location of the effects should control, not the location of the conduct.

To give an example, if two manufacturers decide to engage in joint selling efforts in the Middle East, this statute should serve to protect them from antitrust liability regardless of where they meet and agree to act together. It would be nonsensical for the statute to afford them protection if they meet and agree in London, but not if they meet in New York, or vice versa.

The bill embodies a philosophy that the antitrust laws are intended to protect the American economy from restraints, and the insertion suggested above would make that

very clear. We are concerned that, without this clarification, the bill might be understood as applicable only when the conduct is overseas or only when the conduct is domestic. Our language shows that the geographic focus is on the effects of the conduct in question.

Third, we recommend that the formulation "directly, substantially, and foreseeably restrains . . ." be substituted for "has a direct and substantial effect on . . ." (in lines 3 and 4 of page 2). There are several reasons for this change. The requirement of "foreseeability" is added to incorporate the better view of existing law.[11/] Any statute designed to stimulate American involvement in international trade by providing clear benchmarks for businessmen to follow should make the "foreseeability" of any domestic consequences an essential ingredient in the assertion of U.S. antitrust jurisdiction. This focuses the inquiry on a practical question that the businessman and his counsel can evaluate in assessing a proposed transaction.

In addition, the proposed language makes clear that the "domestic effects" with which the bill is concerned are "restraints" on commerce in the United States. As presently drafted, the bill is quite ambiguous on the kinds of "effects" that might trigger U.S. antitrust jurisdiction. The proposed amendment would avoid any contention that something like financial benefit to the U.S. exporter is a direct and substantial domestic "effect" that invokes the antitrust laws -- a self-defeating interpretation that should be foreclosed.

In our view, a jurisdictional inquiry into the location of the "restraint" would not require a trial of the merits of the case. The issue on the merits would be whether a restraint on competition was unreasonable, but it should be possible for the court to decide, as a preliminary matter, whether the alleged restraint affected domestic commerce. If

the plaintiff cannot satisfy the threshold burden of showing that it did, then the lawfulness of the defendant's conduct should not be at issue at all. Thus, the Roundtable believes that it is both desirable and practical to substitute the term "restrains" for "has an effect."

In applying this "domestic restraint" test, we would expect the courts to continue to look to the economic substance of the transaction, not just to its form. Thus, for example, the evaluation of the domestic effects of a sale would not be controlled by the technicalities of contract law. If a foreign purchaser buying from a U.S. company elects to use a U.S. purchasing agent here whose role is limited to transshipping the goods abroad, the effects of that transaction would be felt abroad, not here. It would make no difference, for purposes of U.S. antitrust jurisdiction, that title to the goods may pass in the United States before the actual export.

Fourth, we suggest deletion of the final clause in proposed Section 7 of the Sherman Act as it is now drafted (lines 4-6 on page 2). That clause would make U.S. antitrust laws applicable whenever activity in foreign commerce "has the effect of excluding a domestic person from trade or commerce with foreign nations." To the extent that this type of activity would be actionable at all as a matter of substantive antitrust law, the additional language is redundant. A direct, substantial, and foreseeable restraint upon a domestic competitor, if otherwise illegal, would be picked up by the prior clause, as we urge the Committee to amend it.

As drafted, however, the second clause may suggest an unwarranted expansion of existing law. For example, existing law does not, per se, prohibit exclusion of a competitor. After all, every contract necessarily excludes a disappointed bidder. It is often said, therefore, that the antitrust laws protect competition, not competitors.[12/]

Not even exclusions by joint industry action are per se illegal. Instead, such exclusions are judged by the "rule of reason," which permits a group to exclude a competitor for good reasons, such as his production of shoddy or unsafe merchandise. The Sherman Act deals with this conduct under the general category of restraints, not separately. The clause that we urge the Committee to delete might create needless and unfortunate uncertainty regarding the impact of the bill on this settled body of substantive law.

The Roundtable is aware of some suggestions to broaden the last clause of proposed Section 7.[13/] These suggestions, however, focus on the problems inherent in speaking about "excluding" a domestic person from commerce, and they do not come to grips with the more basic objection to the second clause in proposed Section 7. Any reference to effects on "domestic persons" or "domestic competitors" in this statute is unnecessary and mischievous: unnecessary, because the principal clause adequately covers anti-competitive restraints felt in the United States; and mischievous, because the novel concept of a "domestic competitor" or "domestic person" will inject new confusion and distortion. The second clause should be deleted entirely.

Any decision by the Committee to retain a distinct provision that makes U.S. antitrust jurisdiction hinge upon the effect on a "domestic person" would raise a related and important question of policy on which the Roundtable would urge close consideration. As presently drafted, the bill may leave American-owned companies doing business abroad without protection when they are the victims of anti-competitive conduct launched from within the United States. We note that the sponsors of S. 795 emphasized that the antitrust laws are designed to protect American consumers and American businesses. It appears that, as drafted, S. 795 would exclude from anti-

trust relief a United States company with a manufacturing facility in Europe that bought price-fixed components or services from an American company engaged in a conspiracy. Whether it would be consistent with American treaty obligations to allow the U.S. company to sue in those circumstances, when a foreign manufacturer could not, is an issue on which we take no position. Where American companies are involved in both ends of an export transaction, however, there would be special basis to make our laws applicable, and less reason to object that application of our antitrust laws would be an unwarranted encroachment on foreign prerogatives.

The Committee should carefully consider, therefore, whether American-owned companies making off-shore or overseas purchases, or purchases for their own export, should be excluded from antitrust protection. If the Committee concludes that it is desirable and proper to have U.S. antitrust laws applicable in this setting, then we would suggest adding appropriate language to achieve that objective.

Fifth, we urge the Committee to clarify the intent of the legislation with respect to antitrust damage actions. As drafted, the bill probably precludes damage suits based on alleged antitrust violations that injure foreign purchasers or consumers of U.S. exports. This conclusion would appear to follow both from the proposed limitation of the coverage of the Sherman Act to domestic anti-competitive effects and from the rule that antitrust damages are only available to compensate for injuries that the antitrust laws were intended to prevent.[14/] However, the present bill leaves room for unnecessary ambiguity.

For example, a foreign purchaser of U.S. exports could argue that the defendant's conduct had domestic as well as foreign effects and that the existence of some domestic effects creates a basis for a damage action

based on the foreign effects as well. While this argument would seem to be without merit under prevailing doctrine, we strongly urge that it be foreclosed expressly. Accordingly, we recommend the following additional language as a new subsection to proposed Section 7, to be inserted after line 6 on page 2.

> "(b) If conduct involving trade or commerce with foreign nations does directly, substantially, and foreseeably restrain trade or commerce within the United States, then the parties engaging in such conduct shall be liable only for any injury so occurring within the United States by reason of such restraints."

The Roundtable views this clarification as important if this bill is to effectuate its premise and to protect American exporters. Our language would provide adequate deterrence against restraints that have substantial domestic effects, since anyone suffering an antitrust injury here could sue for treble damages. There seems to be no legitimate reason to confer a derivative right to sue on foreign purchasers (who are not within the zone of protection intended by U.S. antitrust laws), simply because domestic purchasers or competitors (who are the intended beneficiaries of these laws) would have a right to sue.

A limitation on potential civil liability so as to include only domestic effects -- but not the foreign effects as well -- would be consistent with two sound and generally accepted propositions: our antitrust laws are fundamentally intended to protect U.S. consumers and business;[15/] and standing to recover for injuries under the antitrust laws is limited to injuries of the type that the antitrust laws are intended to prevent.[16/] As the Director of Policy Planning for the Justice Department's Antitrust Division recently stated, it is the Justice Department's enforcement philosophy "that it would be arrogant for the U.S. to attempt to protect

foreigners abroad -- that doing so is the responsibililty of their governments."[17/] Thus, there should be antitrust liability only to those persons injured within the United States by an antitrust violation.

In this connection, we note that the proposed new subsection (b) would be fully consistent with the standard treaties of friendship, commerce and navigation ("FCN" treaties). Our proposed clarification does not turn on the citizenship or nationality of the protected plaintiff, but rather on the geographic location of the alleged injury. Thus, there is no basis for a claim of discriminatory treatment.

Moreover, these FCN treaties typically guarantee foreign nationals no more than access to U.S. courts, but expressly provide that the foreign national's substantive rights, if any, turn exclusively on the terms of the U.S. legislation.[18/] Significantly, many recent FCN treaties refer expressly to antitrust enforcement, but recognize that what each nation "deems appropriate" in this area is controlled "by its legislation."[19/] Thus, the limitation defined in a new subsection (b) would be quite in keeping with international arrangements. It would simply implement the Executive Branch's position "that it would be arrogant for the U.S. to attempt to protect foreigners abroad -- that doing so is the responsibility of their governments."[20/]

If the Committee also decides to protect American firms engaged in off-shore purchases, in accordance with the discussion on pages 15-16 above, then appropriate modification should be made to our proposed subsection (b) to permit damage recovery for that injury as well.

Sixth and finally, the bill contains in section 3 a proposed amendment to Section 7 of the Clayton Act that would exempt joint ventures organized solely for export trade. With respect to this provision, we recommend that the

phrase "whose sales are limited to exporting goods or services from the United States to foreign nations" be substituted on pages 9-11 of page 2 for the phrase "limited solely to export trading, in goods or services, from the United States to a foreign nation."

Our concern is with the term "limited solely." Any U.S. joint venture established to engage in export sales of goods or services is likely to have some domestic activities as an integral part of its export trade: for example, purchasing supplies or services for use in its export business. This incidental domestic activity should not make the incipiency tests of Section 7 applicable, when the joint venture's sole business purpose is to engage in exports. Our proposal would more accurately reflect this intended scope of the exemption.

CONCLUSION

With these changes, and with consideration by the Committee of possible protection of American-owned companies doing business abroad, the Business Roundtable would enthusiastically support enactment of S. 795. We would do so, not only because such legislation would remove unnecessary barriers to business opportunities abroad, but also because we are sure that these revisions of current law would not adversely affect American consumers or competitors at home.

# # #

THE BUSINESS ROUNDTABLE STATEMENT

FOOTNOTES

1/ Testimony of Assistant Attorney General William F. Baxter Before the Senate Judiciary Committee Concerning S. 795, June 17, 1981, at 1.

2/ Remarks of Attorney General William French Smith Before the Business Council, May 9, 1981, at 11.

3/ Thomsen v. Cayser, 243 U.S. 66, 88 (1917); United States v. Imperial Chemical Industries, 100 F. Supp. 504, 592 (S.D.N.Y. 1951); see 15 U.S.C. § 1.

4/ E.g., United States v. General Electric Co., 82 F. Supp. 753, 891 (D.N.J. 1949); United States v. Watchmakers of Switzerland Information Center Inc., 1963 Trade Cases (CCH) ¶ 70,600 (S.D.N.Y. 1962); see J. Shenefield, Extraterritoriality and Antitrust - New Variations on a Familiar Theme (Dec. 10, 1980) (remarks before the International Law Institute).

5/ United States v. Aluminum Co. of America, 148 F.2d 416, 443-445 (2d Cir. 1945); cf., Mannington Mills v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979).

6/ E.g., United States Timken Roller Bearing Co., 83 F. Supp. 284, 309 (N.D. Ohio 1949), modified, 341 U.S. 593 (1951).

The high-water mark of judicial expansiveness in applying the Sherman Act to conduct in foreign commerce was the Minnesota Mining case. United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950). There, the court suggested that, even if concerted action in foreign commerce by U.S. businesses could not be shown to have any effects in the United States, it could in any event be condemned as a per se violation of the Sherman Act. The court speculated that coordination of efforts among the companies in foreign commerce might "reduce their zeal for competition inter sese in the American market." Id. at 963.

7/ I J. von Kalinowski, Antitrust Law & Trade Regulation § 5.02 (1980).

8/ J. Rahl, Foreign Commerce Jurisdiction of the American Antitrust Laws, 43 Antitrust L.J. 521, 523 (1974).

9/ See Department of Justice, Antitrust Guide for International Operations, Antitrust & Trade Reg. Rep. (BNA) No. 799 (Feb. 1, 1977); J. Shenefield, supra, note 4.

10/ See, e.g., Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976); Mannington Mills, Inc. v. Congoleum Corp., supra, note 5; Restatement (Second) of Foreign Relations Law of the United States § 40 (1965).

11/ See United States v. Aluminum Co. of America, supra, note 5, 148 F.2d at 444; Department of Justice, Antitrust Guide for International Operations, supra, note 9.

12/ E.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

13/ See, e.g., Statement of Robert Pitofsky Before the Senate Judiciary Committee on S. 795, at 10-12.

14/ See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra, note 12.

15/ See R. Bork, The Antitrust Paradox, Ch. 2 (1978).

16/ Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977); Chrysler Corp. v. Fedders Corp., No. 78-1287 (6th Cir., March 18, 1981), discussed in Antitrust & Trade Reg. Rep. (BNA) No. 1007, at A-17 (March 26, 1981).

17/ J. Davidow, Extraterritorial Antitrust: An American View (March 12, 1981) (remarks before the International Chamber of Commerce Conference on Extraterritorial Application of Competition Law).

18/ See, e.g., 1954 FCN Treaty Between the United States and West Germany, Art. VI(1), 7 U.S.T. 1839, 1845, T.I.A.S. 3593. See also, Maiorano v. Baltimore & O.R.R., 213 U.S. 268, 274 (1909) (establishing this distinction in construing an FCN treaty with Italy).

19/ E.g., FCN Treaty with West Germany, supra, note 18, Art. XVIII(1) at 1858-59; 1951 FCN Treaty with Israel, Art. XVIII(1), 5 U.S.T. 550, 569, T.I.A.S. 2948; 1950 FCN Treaty with Ireland, Art. XXI(3), 1 U.S.T. 787, 801, T.I.A.S. 2155.

20/ Remarks of J. Davidow, supra, note 17.

It is also worth noting that both the Justice Department and the State Department have testified that legislation to bar foreign governments from bringing suits under U.S. antitrust laws would be compatible with U.S. treaty obligations. Hearings on the Clayton Act Amendments of 1978 before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations, 95th Cong., 2d Sess. 12-13 (1978) (testimony of Deputy Assistant Attorney General Ewing and Deputy Legal Advisory Marks).

This Committee recently relied on this testimony in concluding that legislation to restrict the antitrust standing of one category of foreign purchasers -- foreign governments -- is consistent with United States treaties. See S. Rep. No. 97-78, 97th Cong., 1st Sess. at 10-11 (1981), favorably reporting S. 816, a bill to modify the result of the Supreme Court's decision in Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978).

THE BUSINESS ROUNDTABLE
PROPOSED AMENDMENTS TO S. 795

SEC. 2. The Sherman Act (15 U.S.C. et seq.) is amended by inserting after section 6 the following new section:

"SEC. 7. (a) [~~This Act shall not apply~~] Nothing in this Act, the Clayton Act, or Section 5 of the Federal Trade Commission Act shall apply to conduct involving trade or commerce with [~~any~~] foreign nations, regardless of whether such conduct occurs within or outside of the United States, unless such conduct [~~has a direct and substantial effect on~~] directly, substantially, and foreaseeably restrains trade or commerce within the United States [~~or has the effect of excluding a domestic person from trade or commerce with such foreign nation~~]."

"(b) If conduct involving trade or commerce with foreign nations does directly, substantially, and foreseeably restrain trade or commerce within the United States, the parties engaging in such conduct shall be liable only for the injury so occurring within the United States."

SEC. 3. Section 7 of the Clayton Act (15 U.S.C. 18) is amended by adding at the end thereof the following:

"This section shall not apply to joint ventures [~~limited solely to export trading, in goods or services, from the United States to a foreign nation~~] whose sales are limited to exporting goods or services from the United States to foreign nations."